92-1671

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Petitioners,

v.

CROWN CORK & SEAL COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
NEAL S. DEODHAR
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Petitioners
* Counsel of Record

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QUESTIONS PRESENTED

The court below found it necessary to interpret provisions of two statutes in reaching its decision. If the literal language of either statute were followed, respondent would be liable to petitioner. Rejecting statutory literalism, the court looked in one case to "legislative history" to find alternative meaning to the words of the statute and looked in the other case to "statutory purpose," holding that Congress had not intended to impose liability on respondent.

The questions presented for review are—

Whether a court may disregard the words of a statute when the court believes those words do not best represent Congress' intent in enacting the statute? Specifically—

1. Do the statutory words "permanently ceases all covered operations" mean the same as a "substantial cessation of normal business operations" where the sole basis for the interpretation is snippets of legislative history?

2. Are the statutory words "binding agreement to withdraw" so devoid of meaning that transactions that are neither binding nor agreements to withdraw may nonetheless satisfy the statute under a statutory purpose analysis?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 982 F.2d 857 and is reproduced as Appendix A, *infra*, pp. 1a-19a. The unpublished district court opinion is reproduced at Appendix

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[1] The following Central States trustees were parties to the proceeding in the court of appeals and join in this petition: Robert J. Baker, Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., R. Jerry Cook, and Harold D. Leu. Loran W. Robbins, a defendant in Case No. 84-5737 (E.D. Pa.), and Robert C. Sansone and Marion M. Winstead, defendants in that case and plaintiffs in Case No. 91-4423 (E.D. Pa.), are no longer Central States trustees.

B, pp. 20a-38a. The arbitrator's decision is reproduced at Appendix C, pp. 41a-51a.[2]

JURISDICTION

The district court's jurisdiction was invoked under 29 U.S.C. §§ 1132(e)(1), 1132(f), 1401(b)(2) and 1451(c). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The judgment of the court of appeals affirming the district court was entered on December 23, 1992, and its order denying rehearing was entered on January 19, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in Appendix I, pp. 90a-92a.

STATEMENT OF THE CASE

1. *The Parties*

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund") is a multiemployer pension plan within the meaning of Sections 3(2), (35), (37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(2), (35), (37) and 1301(a)(3).[3] The trustees of Central States are collectively the "plan sponsor" within the meaning of 29 U.S.C. §§ 1002(16)(B) and 1301(a)(10). Crown Cork & Seal Company Inc. ("Crown Cork") is a Pennsylvania corporation, which

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[2] The arbitration followed an earlier action between the same parties concerning generally the same issues. The opinion of the first district court was rendered on December 30, 1988. The opinion of the court of appeals in that action is reported at 881 F.2d 11 (3d Cir. 1989). Citations to the Appendix are hereafter abbreviated as "App. ——, at ——."

[3] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

previously made pension fund contributions to Central States pursuant to the terms of a collective bargaining agreement between itself and a local union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

2. *The Statute*

Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 *et seq.* was amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which was codified in relevant part at 29 U.S.C. §§ 1381-1451. Under the MPPAA amendments, an employer that withdraws from a multiemployer pension plan is liable to the plan for its share of the plan's unfunded vested benefit liability.[4] The employer's share is called its "withdrawal liability." 29 U.S.C. § 1381. Upon determining that a withdrawal has occurred, the plan sponsor is required to notify the employer, provide a schedule of payments calculated in accordance with the statute and "demand payment in accordance with the schedule." 29 U.S.C. §§ 1382 and 1399(b)(1).

If the employer disputes the plan's determination of a withdrawal or the calculation of liability, the statute provides a two-step review process. First, the employer may request review by the plan itself within 90 days of the initial plan notice. 29 U.S.C. § 1399(b)(2). If the employer still disputes the liability assessment following the plan's review, it may initiate arbitration within 60 days of the plan's response (or, if earlier, 120 days of the request for review). 29 U.S.C. § 1401(a). Within 30 days of the issuance of the arbitrator's final award either party may bring an action in the United States district court to enforce, vacate, or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2).

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[4] *See Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720-725, 104 S.Ct. 2709, 2713-2715, 81 L.Ed.2d 601 (1984).

3. *Facts and Proceedings Below*

This case arose from Crown Cork & Seal Company, Inc. ("Crown Cork") closing of its St. Louis facility. Production, maintenance and some clerical employees at the plant were represented by Local Union 688 which is affiliated with the International Brotherhood of Teamsters. *Crown Cork & Seal Co. and Central States Pension Fund*, No. 51-621-0022-89V (Amer. Arb. Assn. 1992), App. C, at 44a.[5] Crown Cork's collective bargaining agreement with the local union obligated Crown Cork to remit pension contributions to the Central States for work performed by the covered employees. Specifically, Article 28 of the agreement required that Crown Cork contribute to Central States for each *employee*, which the contract defined in Article I, Section 2 as "all production and maintenance employees". In 1980 Crown Cork decided to close the St. Louis plant.

As of March, 1980, there were 148 production and maintenance employees and 12 clerical employees on whose behalf Crown Cork remitted pension contributions to Central States. By September 25, 1980, these numbers had fallen to 44 production and maintenance employees, and 4 clerical employees. On July 28, 1980, Crown Cork announced that it intended to close the St. Louis plant and on September 23, 1980, Crown Cork entered into a listing agreement with Turley Martin Company, a real estate broker, to sell the St. Louis facility. (The plant was eventually sold by a sale agreement executed June 3, 1982.) By December 31, 1980, 3 members of Local 688's production and maintenance unit and 1 member of the clerical unit were still employed at the plant and as a result Crown Cork continued to remit pension contributions on their behalf. The last employee covered by the collective bargaining agreement was terminated on November 6,

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[5] The facts of this case are also set out in *Crown Cork & Seal Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 881 F.2d 11, 15 (3d Cir. 1989).

1981; thereafter Crown Cork's contributions to Central States ceased.

The Pension Fund determined Crown Cork had effected a complete withdrawal when it permanently ceased contributions in November, 1981. On November 2, 1983, Crown Cork received the Pension Fund's notice and demand for payment of withdrawal liability. Crown Cork requested review of the Pension Fund's withdrawal liability determination by letter dated December 30, 1983. The Pension Fund responded to the review request on March 23, 1984, and affirmed its assessment of liability. Crown Cork then filed a declaratory action in the United States District Court for the Eastern District of Pennsylvania in November, 1984. Crown Cork sought, *inter alia,* a declaration that under the Deficit Reduction Act of 1984 ("DEFRA") it owed no withdrawal liability to the Pension Fund because (it argued) it had a binding agreement to withdraw and did in fact completely withdraw in 1980. The Pension Fund filed a motion to dismiss, which was granted in part and denied in part.

The case was then stayed because questions regarding the constitutionality of MPPAA were pending in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) After this Court upheld the statute, the parties filed cross-motions for summary judgment. On December 30, 1988, the district court issued an order granting Crown Cork's summary judgment motion and denying the Pension Fund's cross-motion.

The Pension Fund appealed to the United States Court of Appeals for the Third Circuit. On July 14, 1989, the court reversed that part of the December 30, 1988 order granting Crown Cork's summary judgment motion and affirmed that part of the order that denied the Pension Fund's cross-motion on the ground that 29 U.S.C. § 1401(a)(1) required arbitration of the dispute. In response to Crown Cork's contention that arbitration may

be bypassed in a case involving solely questions of statutory interpretation, the court held ERISA's arbitration requirement applies even when only issues of statutory interpretation are involved and that, in the present case, a number of factual issues existed which further warranted arbitration.

On remand to arbitration the parties stipulated to the underlying facts of the case and submitted the case on briefs to a neutral arbitrator. On January 15, 1991, the arbitrator issued his decision in favor of the Pension Fund, ruling that Crown Cork did not completely withdraw before September 26, 1980, and specifically finding that neither the plant closing announcement nor the real estate listing constituted a "binding agreement to withdraw" as of September 26, 1980. App. C, at 41a-51a. Therefore, Crown Cork could not avoid its withdrawal liability by operation of the Deficit Reduction Act of 1984. On June 7, 1991, the arbitrator determined that Central States was entitled to a judgment of $2,072,247.08 pursuant to the original assessment schedule.

Crown Cork filed a motion to vacate the arbitrator's decision with the district court under Case No. 84-5737. In order to comply with 29 U.S.C. § 1401(b)(2), which requires an "action" to enforce an arbitration award, the Pension Fund filed a new case, No. 91-4423, seeking enforcement of the arbitrator's award. On July 19, 1991, the new action was reassigned (pursuant to a prior agreement) as a related case to Judge McGlynn and the cases were consolidated.

On April 1, 1992, the district court granted Crown Cork's motion to vacate and denied the Pension Fund's request for enforcement. App. B, at 20a-38a. The district court determined that the crucial issues of the arbitration involved mixed questions of fact and law. The court decided to separate the legal and factual questions, and apply a *de novo* standard of review to the arbitrator's legal determinations and a "clearly erroneous" standard

to the arbitrator's factual determinations. Applying these standards, the district court held that while the arbitrator correctly determined Crown Cork had not completely withdrawn by September 26, 1980, the arbitrator was incorrect when he found that Crown Cork's announcement of its plant closing and its real estate listing agreement did not constitute a "binding agreement to withdraw" pursuant to § 558 of DEFRA. The district court then determined that because Crown Cork had ceased "normal business operations" by December 31, 1980, it had "ceased all covered operations" under the plan and thus effected a complete withdrawal within the period for which DEFRA excused liability.

The Pension Fund appealed to the Third Circuit on April 27, 1992. The issues presented to the court were essentially the same as those presented in the instant petition. The court of appeals affirmed the district court in all respects on December 23, 1992. Rehearing was denied on January 19, 1993 (with three judges voting in favor of rehearing in banc).

SUMMARY OF REASON FOR GRANTING THE WRIT

The Third Circuit held that Crown Cork effected a "complete withdrawal" from Central States before December 31, 1980, even though some of its employees continued to work (and Crown Cork continued to remit contributions on their behalf pursuant to the collective bargaining agreement) until November, 1981, and notwithstanding that the statute requires that "all covered operations" permanently cease. This determination directly conflicts with the Seventh Circuit's earlier ruling that when Congress specified that "all covered operations" must cease it meant 100% and not "virtually all" covered operations. *Trustees v. Allied Products Corp.*, 872 F.2d 208 (7th Cir. 1989). The court below did not follow the Seventh Circuit because it believed the statutory terms "covered" and "operations" were ambiguous. Noting that

recourse to legislative history was thus *mandated*, the court found suggestions there that covered operations meant only "normal business operations" and that "virtually complete" was the same as "all." Confronted with the same arguments, the Seventh Circuit had rejected recourse to legislative history because the meaning of the statute was evident on its face.

There is, thus, a conflict between two circuits on this point—a conflict that places multiemployer pension plans like Central States in an untenable position. Central States, headquartered in Chicago, covers many employers who do business in more than one federal appeals circuit. Venue for litigation is generous under ERISA, hence Central States often cannot know in advance which law to follow. If it follows the Third Circuit rule that withdrawals occur before the last contribution is made, disadvantaged employers will sue in Chicago. Conversely, if Central States follows the Seventh Circuit rule, most Central States contributors can find venue in a different circuit, as did Crown Cork, through a declaratory action.

The Third Circuit also disregarded this Court's rulings on the plain meaning rule, by turning to legislative history to muddy the meaning of an otherwise unambiguous statute. *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). Further, even if there were some ambiguity in the statute, the Pension Benefit Guaranty Corporation ("PBGC"), the government agency responsible for the statute, had rendered an interpretation that the court completely disregarded contrary to *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Finally, even if resort to legislative history were appropriate, the portions relied upon by the court below were an unreliable barometer of congressional intent.

In further disregard of statutory plain meaning the court below disregarded the statutory language "binding agreement to withdraw," which it held lacked meaning.

The court then rejected any help from the legislative history and case law that provided examples of such agreements, ignored the PBGC's views, and went directly to congressional purpose. Ruling that Congress intended to relieve employers like Crown Cork from withdrawal liability, the court held that circumstances that were not binding agreements to withdraw but had a similar effect were sufficient to meet the statutory requirement. The court was wrong as a matter of law to go outside of the statutory language. Moreover the arbitrator, examining all of the facts, found that Crown Cork had no binding agreement, a ruling that was entitled to deference unless rebutted by a "clear preponderance of the evidence."

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW CONFLICTS WITH A SEVENTH CIRCUIT DECISION INTERPRETING THE SAME LEGISLATIVE TEXT.

The United States Courts of Appeals for the Third Circuit and the Seventh Circuit have now considered the meaning of the statutory text of 29 U.S.C. § 1383(a). In pertinent part that text provides:

> A complete withdrawal from a multiemployer plan occurs when an employer—
>
> > (1) permanently ceases to have an obligation to contribute under the plan, or
> >
> > (2) permanently ceases all covered operations under the plan.

The Seventh Circuit held this language to be unambiguous and refused to consider legislative history purporting to explain the statutory meaning in a manner inconsistent with the statute's words. *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989). Specifically the court held that "permanently ceases all covered operations under the plan" requires a 100% cessation of the work which

gives rise to the employer's obligation to contribute to the plan.

In the present case the Third Circuit expressly rejected the reasoning of the Seventh Circuit, ruling that two terms, "covered" and "operations," cannot be defined without resort to legislative history. The court rejected the Seventh Circuit's conclusion that "all covered operations under the plan" means 100% of bargaining unit work that gives rise to the obligation to contribute to the plan and adopted another view—that "all" may mean something less than all, and that covered operations are only the "normal" business operations of a company (whether or not the company contributes for other operations). Thus, according to the Third Circuit, a complete withdrawal occurs upon a "substantial cessation of normal business operations" of the employer. App. A, at 18a. The Seventh Circuit and the Third Circuit are thus in conflict over the meaning of "all covered operations under the plan," and consequently over what constitutes a complete withdrawal from a multiemployer pension plan like Central States. This Court should issue a writ of certiorari to the Third Circuit in order to resolve the split of authority.

The problem created by this split is significant and will affect most, if not every, determination of withdrawal liability by multiemployer pension plans, particularly large plans like Central States that are left to guess, case by case, which rule applies. Central States operations are nearly countrywide. Many other plans, particularly in the trucking industry, span several circuits.[6] Venue for

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[6] The Teamsters Pension Trust Fund of Philadelphia and Vicinity, the North Jersey Teamsters Pension Trust, the Central Pennsylvania Teamsters Pension Fund, and the Western Pennsylvania Teamsters Pension Fund are several of the plans administered within the Third Circuit but which cover employers with broader operations. See *Flying Tiger Line v. Teamsters Pension Trust Fund* 830 F.2d 1241 (3d Cir. 1987).

litigation is appropriate where either the pension plan or the employer does business. 29 U.S.C. § 1451(d). If Central States had sued Crown Cork first in Illinois, it would have won under the Seventh Circuit rule. But if Crown Cork (or another employer) finds an earlier date of withdrawal convenient, it may bring a declaratory action in a district court within the Third Circuit (as Crown Cork did in this case) to achieve a different result.

The circumstances leading to this problem—where a contributing employer substantially reduces its operations—are not rare, and the date of withdrawal can significantly affect the amount of liability. Certain partial withdrawals span several years. 29 U.S.C. § 1485(b)(1). The amount of unfunded vested benefits (and thus the amount of withdrawal liability) under a plan varies from year to year. Where liabilities are rising, withdrawing employers may wish to have the withdrawal date occur in earlier years by claiming their partial withdrawal is really a substantial cessation of "normal business operations"—*i.e.*, a complete withdrawal under the Third Circuit rule.

Pension plans may also be encouraged to forum shop. A plan must wait four years from the onset of a 70% decline partial withdrawal before it can issue a partial withdrawal liability assessment. 29 U.S.C. §§ 1385 (b)(1) and 1386(a)(2)(A). In cases of "substantial cessations," however, the plan can immediately bill for a complete withdrawal under the Third Circuit rule.[7] By acting early the plan reduces collection risks and gains immediate payment.

Even as the Third Circuit's opinion was rendered, Central States was already embroiled in multi-circuit litigation

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[7] Of course if Central States were to issue an assessment to a Pennsylvania company, it could expect the company to file a declaratory action in Illinois upon receipt of the assessment. Central States might counter this tactic by filing its own declaratory action in Pennsylvania before or simultaneous with the employer's receipt of the assessment.

that presented this very problem. Pennsylvania Truck Lines, Inc. ceased contributing to Central States and filed for bankruptcy in the Eastern District of Pennsylvania. *In re: Pennsylvania Truck Lines, Inc.*, No. 92-12370S (Bkrtcy., E.D. Pa.). Central States filed a withdrawal liability claim for approximately $1.7 million. Central States also sued several non-bankrupt affiliates of Pennsylvania Truck Lines in the Northern District of Illinois to collect the same liability, which was joint and several.[8] *Central States, Southeast and Southwest Areas Pension Fund, et al. v. PTL Terminal Services, Inc., et al.*, 92 C 4392 (N.D. Ill.). The bankrupt company, which continued to operate under Chapter 11 of the Bankruptcy Code, then entered into a new collective bargaining agreement requiring contributions to Central States. The new level of covered operations was only about 10% of pre-petition levels.

The principal defense of these companies (in both proceedings) was that the resumption of contributions obviated the "complete withdrawal." If the companies were successful in that argument, they would escape liability—at least until the time required under 29 U.S.C. § 1385 to establish partial withdrawal liability had elapsed. In the Pennsylvania action, however, the defense might fail. Under the Third Circuit rule a 90% decline in normal operations probably constitutes a "substantial cessation of normal business activity."[9] Thus, Pennsylvania Truck Lines would appear to have had an immediate withdrawal based on its substantial cessation

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[8] The joint and several liability arises from 29 U.S.C. § 1301 (b)(1). *See Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992); *PBGC v. Ouimet Corp.*, 630 F.2d 4, 11-12 (1st Cir. 1980).

[9] Indeed the new contracts did not cover any of the former operations (or employees) of the company, which permanently ceased (at a 100% level), but were entirely new and covered a different kind of work.

of "normal business operations." The affiliates' defense in the Illinois action, under *Allied Products,* is stronger. Thus the split in circuits leads to the incongruous result that members of the same control group will have different liability determinations for the same event.

Of course Central States cannot be sure that it would prevail against Pennsylvania Truck Lines, or any other employer, in the Third Circuit because of the ambiguity of the new standard. The court has rejected the bright line "all equals 100%" rule of the Seventh Circuit in favor of an inherently subjective rule that "all equals a substantial cessation of normal business operations." The Court did not, however, define normal business operations, suggest what normal business operations are for a given employer, or establish what percentage of such operations must cease to meet the substantiality requirement for a complete withdrawal.[10]

For example, suppose a trucking company of 100 employees contributes to Central States only for its janitorial crew of 2 employees. If the company ceases trucking operations but continues to employ and contribute on behalf of its janitorial crew, has it withdrawn because it has a "substantial cessation of normal business opera-

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[10] Does it mean "substantially all" operations? Case law and legislative history hold 85% to constitute substantially all. *See Continental Can Co. v. Chicago Truck Drivers Union Pension Fund,* 916 F.2d 1154 (7th Cir. 1990). Since an employer has a substantial cessation when only 15% of its normal operations remain and a partial withdrawal when only 30% remain, it appears that at least hall of all 70% decline partial withdrawals are eligible for early assessment under the Third Circuit rule. This conflict with the partial withdrawal rules is not at all surprising, however, because the partial withdrawal rules were Congress' response to the problem of substantial cessations of contributions by employers. The Third Circuit's interpretive fix, thus, is redundant. *See* Section II, 3, *infra.*

tions"?[11] May Central States anticipate the ultimate cessation of janitorial work (in say, 1994) and assess the employer immediately although there is no decline in contributions? May the employer insist on it? The fact of the matter is that the statute focuses on *contribution* levels, not operational levels. There is no withdrawal if contributions continue to be made on behalf of the janitorial crews as long as the level of contributions does not decline to partial withdrawal levels.[12] Indeed, Crown Cork did not go out of business (or substantially cease normal business operations); it only closed a plant. If Crown Cork had contributed to Central States for work performed at another of its plants under a different collective bargaining agreement, the fact that it closed the St. Louis plant would not constitute a withdrawal of any kind. This example not only underscores the ambiguity of the Third Circuit rule, but demonstrates its unworkability. Pension plans, employers and arbitrators are left to assert their own interpretations of these terms, which, of course, must ultimately be resolved by the courts. Given the vagueness of these new standards the courts will no doubt be forced to revisit this issue repeatedly. This Court should grant the petition for certiorari, reverse the Third Circuit, and adopt the Seventh Circuit holding.

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[11] Under labor law and under the terms of Central States Pension Plan, if the janitorial work is covered under a collective bargaining agreement under which contributions are due Central States, then the work is covered operations notwithstanding what the employer characterizes as "normal." *See* Section II, A, *infra*.

[12] The partial withdrawal rules are themselves simply mathematical constructs derived solely from contribution levels, not operational levels. That the two are often related does not mean that one may be substituted for the other, as the Third Circuit did.

II. BY ALLOWING LEGISLATIVE HISTORY EXCLUSIVELY TO DEFINE CONGRESSIONAL INTENT AND OVERRIDE THE EXPRESS TERMS OF A STATUTE, THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISIONS REGARDING THE SCOPE OF JUDICIAL INTERPRETATION OF A STATUTE.

Where the meaning of a statute is plain by its own terms, the courts are not free to substitute a different meaning derived from non-statutory sources. *Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917) (holding when a statute's language is plain, sole function of the courts is to enforce the statute according to its terms); *U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *West Virginia University Hospitals, Inc. v. Casey*, —— U.S. ——, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991); *Patterson v. Shumate*, —— U.S. ——, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). Yet this is precisely what the court below did. As this Court's decisions make clear, only in limited circumstances may a court look behind the statute to legislative history. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982) (literal construction of statute is conclusive unless such an interpretation produces an absurd and unjust result). Even if a court deems a statute ambiguous, resort to legislative history is often not the best (or even an appropriate) source of clarification. *See Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Nonetheless, to resolve this case the Third Circuit looked first to legislative history to develop a meaning that is contrary to the literal language of the statute and contrary to the interpretation of the agency entrusted to administer the statute. In reaching its decision, the Third Circuit disregarded the statutory context, including related statutory provisions and analogous use in related statutes.

Further, this case demonstrates the dangers of resorting to isolated portions of legislative history. The state-

ments that the court relied upon not only conflict with the words of the statute, but also conflict with other portions of the legislative history. Further, the concern addressed by the legislative history relied upon by the court below was ultimately resolved by adding special rules in another section of the statute,[13] and the legislative history was apparently modified and retained in an effort to influence then-pending litigation.

A. The Plain Meaning Rule; *Caminetti v. United States.*

This Court has expressed the plain meaning rule in *Caminetti v. U.S.*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917) and countless other cases numbering perhaps a dozen last term alone. Under that rule the language of the statute is the starting point for statutory interpretation and, if the language is clear, is the ending point also. The first statute at issue here, 29 U.S.C. § 1383(a) provides—

> For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—
>
> > (1) permanently ceases to have an obligation to contribute under the plan, or
> >
> > (2) permanently ceases all covered operations under the plan.

The Third Circuit believed this language was not clear enough for it to require that *all* activity giving rise to an employer's obligation to contribute to the plan pursuant to a collective gargaining agreement cease before a complete withdrawal occurs.[14]

> We find that the statutory language "all covered operations" is not sufficiently clear and free from

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[13] These points were made to the court but are wholly absent from the decision.

[14] It is undisputed that Crown Cork continued to have an obligation to contribute until November, 1981, and therefore did not withdraw under paragraph (1).

> ambiguity as to stand on its own. *Resort to legislative history is thus mandated.* Indeed, we find that two of the terms contained in that phrase, specifically "covered" and "operations," cannot be defined without resort to it. Our examination of the legislative history leads us to conclude that substantial cessation of normal business activity meets the complete withdrawal standard.

App. A, at 18a (emphasis added). The court reached this conclusion only after considering certain legislative history to create the ambiguity, giving no consideration to the words of the statute in their own context. If by singling out a word or two and declaring their meaning, out of context, unclear, *mandates* resort to legislative history, then no statute is unambiguous (or safe from judicial intrusion). Legislative history must not be allowed to first create ambiguity and then resolve it.

If the words "covered operations" are read in context, it is clear a complete withdrawal occurs when an employer permanently ceases *all operations that give rise to the obligation to contribute to the plan.* Can it be said that Crown Cork's withdrawal was "complete" although it continued (as required by the collective bargaining agreement) to contribute to the plan? Is a cessation "permanent" with respect to "all" covered operations although contributions continue for some employees? Is it conceivable that Congress meant an employer could effect a complete withdrawal under one ERISA section (§ 1383) while still obligated to make contributions under another ERISA section (§ 1145)? Under the plain meaning rule the court's analysis should have stopped with the statute for its words are clear.

This Court had an opportunity just last term to apply the plain meaning rule to a case involving the Bankruptcy Code and ERISA in *Patterson v. Shumate,* —— U.S. ——, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992). There the district court had concluded that Congress

intended a narrower reading of the statute than its literal statement. The court of appeals reversed and this Court affirmed the reversal. "In our view, the plain language of the Bankruptcy Code and ERISA is our determinant." *Id.* at 2246 (citing *Toibb v. Radloff*, —— U.S. ——, 111 S.Ct. 2197, 2199, 115 L.Ed.2d 145 (1991)). The Court looked first to the natural reading of the provision and then to whether it comports with other references in the Bankruptcy Code. "The Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope [of the statute]." *Id.* The same may be said of Congress' use of the modifier "substantially" in certain provisions of ERISA when it meant less than all.

Thus, even if the phrase "all covered operations under the plan" were not clear, the court should have examined related provisions of the same statute to provide further context. This approach also reveals that a complete withdrawal requires either the cessation of the obligation to contribute or 100% cessation of the activity that gives rise to the obligation to contribute. The statute provides partial withdrawal rules to cover those circumstances where some, but not all, of an employer's covered operations cease. 29 U.S.C. § 1385(a). Crown Cork was covered by these rules, its contributions (or in the vernacular of ERISA, its contribution base units) having declined by more than 70% in 1981. Had it continued contributions at that reduced level through 1982 and 1983, it would have become liable for a partial withdrawal on December 31, 1983. *Id.* Only its 100% decline in November 1981, converted the impending partial withdrawal into a complete withdrawal. Obviously, Congress knew how to write partial withdrawal rules that covered employers like Crown Cork and in fact did so. Further, Congress also wrote a special rule to cover construction employers who reduce covered operations but employ a token workforce to avoid liability. 29 U.S.C. § 1388(d). So Congress obviously knew how to deal with severe declines like Crown Cork's if it wished. If Con-

gress made § 1385, and not § 1388(d), applicable to Crown Cork, the Third Circuit may not infer an inadvertent omission and fill the gap through legislative history. To the contrary, it must infer deliberate action—that Congress meant precisely what it wrote.

Other sections of ERISA provide additional relevant context. The statute uses the terms "substantially all" (29 U.S.C. § 1383(d)) and "substantially the same" (29 U.S.C. § 1384) where Congress meant less than all. Why then would Congress rely on legislative history rather than text to make the "all" in § 1383 the equivalent of less than all? [15] The obvious inference is that if Congress meant "substantial cessation" instead of "all" it would have written it that way, and that when it used "all" it meant precisely that.

Next, the court might (and should) have turned to other labor statutes and judicial decisions in the labor law context for clarification of "covered operations under the plan." Under labor law, "covered work" means work described in (covered by) a collective bargaining agreement. *See Sheet Metal Workers v. 2300 Group, Inc.*, 949 F.2d 1274 (3d Cir. 1991); *Flanigan v. Truck Drivers Local 671*, 942 F.2d 824 (2d Cir. 1991); *General Truck Drivers Local 957 v. N.L.R.B.*, 934 F.2d 732 (6th Cir. 1991); *Carpenters Local Union 953 v. Mar-Len of Louisiana, Inc.*, 906 F.2d 200 (5th Cir. 1990); *Trustees of Iron Works Fund v. A & P Steel, Inc.*, 812 F.2d 1518, *reh'g denied*, 824 F.2d 817 (10th Cir. 1987); *Laborers Health and Welfare Trust Fund v. Kaufman &*

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[15] In fact it can be shown that these partial withdrawal rules were Congress' response to concerns over employers avoiding liability by maintaining small workforces following large declines in contributions. *See* Section C, *infra*. Congress also provided 29 U.S.C. § 1392(c) to allow plans to disregard transactions intended to evade or avoid withdrawal liability (e.g., maintaining token workforces). The Third Circuit has undertaken to use the legislative history to fix the same problem (to Crown Cork's benefit) that Congress had already fixed, apparently because the statute, in the court's view, did not do full justice to the legislative history.

Broad of Northern California, Inc., 707 F.2d 412 (9th Cir. 1983); *Waggoner v. C & D Pipeline Co.*, 601 F.2d 456 (9th Cir. 1979). Consistent with this the Central States Pension Plan defines "covered employment" as that for which contributions are required to be made on behalf of an "employee," which, in turn, is defined as one employed under the terms of a collective bargaining agreement. *See* Excerpts of Central States Pension Plan, App. G, at 68a. Indeed, ERISA itself recognizes that both documents govern. *See* 29 U.S.C. § 1145. With this background in mind, "covered operations" clearly means those operations that give rise to the obligation to contribute, which in this case is defined by the collective bargaining agreement. Crown Cork's 1981 operations were plainly covered under the plan in this context.[16]

The Third Circuit did not address any of this. Instead it leaped immediately to portions of the legislative history, which it uncritically adopted in violation of the plain meaning rule. Because the Third Circuit disregarded this Court's decisions establishing the proper scheme of statutory interpretation, this Court should issue the writ of certiorari.

B. Agency Interpretations: *Chevron v. NRDC.*

The Third Circuit's decision is also in conflict with this Court's decision in *Chevron, U.S.A. v. NRDC*, 467 U.S.

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[16] Crown Cork and the Third Circuit were concerned that § 1383 (a)(2) not be subsumed under § 1383(a)(1) and made a nullity. If (a)(2) were only a clarifying redundancy (of which there are no shortages in our legal culture) that insures that an employer does not avoid liability with an open-ended contract—a continuing "obligation" to contribute but no covered work being performed, it would contain substance enough. If (a)(2) discourages unintended parsing of the term "obligation to contribute" then it is not a nullity. In fact a Recall Agreement, a plant closing agreement, or even a collective bargaining agreement may, and often do, impose an obligation upon the employer to contribute should work ever resume at the facility but would not under (a)(2), defeat a withdrawal if there were in reality a permanent cessation of covered work. See *Concrete Pipe and Products v. Construction Laborers Pension Trust*, No. 91-904 (U.S.).

837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), by ignoring the interpretation given the statute by the federal agency responsible for administering the statute. In *Chevron*, this Court ru'ed that if a statutory term is ambiguous and that ambiguity cannot be resolved in statutory context, before resorting to legislative history the court should turn to the interpretation given by the agency of the government charged with oversight of the statute. If such interpretation is based upon a permissible construction of the statute, the court should defer to the agency's interpretation. 104 S.Ct. at 2781-82. In this case a government agency, the Pension Benefit Guaranty Corp. ("PBGC") examined the statute in question and concluded that a complete withdrawal does not occur until all contributions cease and all operations giving rise to the contribution obligation cease. App. F, at 60a. Moreover, this court has particularly underscored the importance of PBGC's views in interpreting Title IV of ERISA. *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990); *Mead v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989).

Here, not only did the Third Circuit fail to defer to the PBGC's interpretation, it did not even acknowledge the PBGC's view.[17] Under *Chevron*, before the court could formulate its own interpretation, it must find that the agency interpretation was not based on a permissible statutory construction. By ignoring this step the Third Circuit has placed itself squarely in conflict with *Chevron*.[18] This Court should, therefore, issue the writ of certiorari.

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[17] PBGC's interpretation was provided to a different panel of the Third Circuit in a brief *amicus curiae* in an earlier appeal of the same case, just as it was provided to the Seventh Circuit in *Allied Products*. The PBGC brief was provided the panel in this appeal through the joint appendix. Excerpted at App. F, at 60a-67a.

[18] True, PBGC has not issued a regulation on the subject. If that is relevant at all, however, it goes to the degree of deference to be accorded—the weight of the opinion. To ignore the PBGC entirely (or to overlook it) is clear error under *Chevron*.

C. This Case Is A Paradigm For the Unreliability of Legislative History; The Legislative History Relied Upon By The Court Below Advanced An Agenda Apart From The Statute It Purported To Explain.

The inherent dangers of relying on legislative history are manifested in this case.[19] Even if the Third Circuit were right to turn to the legislative history (i.e., if the statute were truly ambiguous and the government had rendered no valid interpretation), the court did not look closely enough to see that the legislative history it chose to rely upon was flawed and thus a poor indicator of Congress' intent. For several reasons the court should have rejected the legislative history as inaccurate and unreliable.

First, the two committee reports the Third Circuit relied upon were the reports of the first committees to consider the bill (the House Education and Labor Committee and the Senate Labor and Human Resources Committee). In both cases the bill was passed to another committee (the House Ways and Means Committee and the Senate Finance Committee, respectively), and both of the latter committees issued reports amending the bill and omitting the legislative history the Third Circuit relied upon. Thus it cannot be said that all (or even a majority) of the committee members intended that "all" mean something less than all. The Congress as a whole and the President, relying if at all on the final Committee reports and the Conference Report, had literally not a clue that the Labor Committees might have intended this atypic meaning.

Second, if the Third Circuit had looked one level deeper, it would have seen the origin of the legislative his-

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[19] *See Conroy v. Aniskoff*, —— U.S. ——, —— S.Ct. ——, 61 U.S.L.W. 4301 (1993) (Scalia, J. concurring); *NLRB v. Allis-Chalmers*, 388 U.S. 213, 217, 87 S.Ct. 2001, 2025 (1967) (White, J. concurring). *See* also *Continental Can Co., Inc. v. Chicago Truck Drivers Union Pension Fund*, 916 F.2d 1154 (7th Cir. 1990) (Easterbrook, J. rejecting another piece of MPPAA legislative history).

tory and realized its interpretation of the history was erroneous.[20] *Hearings on the Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Taskforce on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 96th Cong. 1st Sess. (June 5, 1979)* ("House Labor Hearings"). Excerpted, App. H, at 74-89.[21] The bill originally proposed by PBGC and introduced in Congress contained no partial withdrawal rules. Several witnesses described abuses, citing a "virtually complete" withdrawal by a company called Kollsman Instrument Company and pointing out that under existing law employers like Kollsman could escape liability even after severe declines in contributions to the plan.[22] PBGC had taken the position even then that "withdrawal" meant "complete withdrawal," i.e., 100%. The witnesses were concerned that pension plans and PBGC were at risk while employers escaped liability through the technical loophole of keeping a token workforce active while curtailing most operations. *See* House Labor Hearings (Statement of Don Seifman, Counsel, Retail Clerks International Union) (noting PBGC's opinion that present statute did not cover partial with-

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[20] If the Third Circuit were right to look at the legislative history in the first place, was it entitled to rely only on the plain meaning of the language of that history, or must it peal back each layer until the whole is exposed? Ironically the legisltaive history of the legislative history reveals a two-pronged intent of Congress, as this and the next paragraph show, and neither prong supports the Third Circuit's view.

[21] A similar hearing was held by the Senate with many of the same witnesses and statements. Hearings Before the Committee on Labor and Human Resources United States Senate, 96th Cong. 1st Sess. (June 26 and 27, 1979).

[22] The witnesses generally referred to litigation then-pending against Kollsman by its named plaintiff, Solar, rather than the defendant Kollsman. *See Solar v. PBGC and Kollsman Instrument Co.*, 504 F. Supp. 1116 (S.D.N.Y. 1981), *aff'd* 666 F.2d 28 (2d Cir. 1981).

drawals and need for partial withdrawal rules).[23] In response to these concerns the committees wrote the partial withdrawal rules now found in 29 U.S.C. § 1385.[24] Since the concern expressed in the legislative history was addressed by adding what later became 29 U.S.C. § 1385, it was wrong of the Third Circuit to resurrect the history to apply it to § 1383 as if Congress had not acted.

Third, the court below could have asked why the legislative history it relied upon stated that the concept of a "virtually complete" withdrawal was "consistent with existing law" when it demonstrably was not in accord with the existing law. *See* H. Rep. No. 96-869, Pt. I, 96th Cong. 2d Sess. 73, *reprinted in* 1980 U.S.C.A.N. at 2936. The then-existing law is reflected in *Solar v. Pension Benefit Guaranty Corp.*, 504 F. Supp. 1116 (S.D.N.Y. 1981) *aff'd*, 666 F.2d 28 (2d Cir. 1981). PBGC initially took the position in *Solar* that a virtually complete withdrawal could not occur under section 4063 of ERISA (the pre-MPPAA version of withdrawal liability), then codified at 29 U.S.C. § 1363 (1976). *Id.* This should have been enough of a warning for the court to reject the legislative history out of hand. A bit more investigation, however, reveals another purpose behind this "legislative history." In mid-litigation, PBGC changed its mind and informed the *Solar* court that Kollsman, whose participants had fallen to about 1% of prior levels, had withdrawn after all in a "virtually complete" withdrawal. *Id.*[25] Virtually simultaneous

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[23] Excerpts of Mr. Seifman's testimony are set out in the App. H, pp. 79a-81a. Also excerpted are similar statements of Robert Georgine on behalf of the National Coordinating Committee of Multiemployer Plans and other witnesses. App. H, at 82a-89a.

[24] The original bill Section 4201(b)(6), App. H, at 74a, allowed PBGC to provide partial withdrawal rules by regulation. Following these hearings the bill was amended to provide specific rules. Section 4201(b)(6), App. H, at 77a.

[25] PBGC's brief to the Second Circuit contained a succinct history of its position in its Statement of the Case. App. E, at 54a-59a.

with PBGC's change of mind (it notified the district court on March 27, 1980), the first Committee Report (the House Labor Committee Report issued April 2, 1980) changed the legislative history from complaining of existing law where there were *no* virtual withdrawals, to supporting "existing law" where there *were* virtual withdrawals. Thus the legislative history, far from accurately reflecting the state of the law or congressional intent, appears to be at best a predecessor to the partial withdrawal rules, and at worst an effort to influence the pending *Solar* case.[26]

As this case demonstrates, recourse to legislative history is inherently risky, particularly where, as here, the legislative history is an unreliable indicator of congressional intent. It is a worthy text-book example demonstrating the merits of legislative text over legislative history as a basis of statutory interpretation. By failing to follow this Court's direction in *Caminetti* and in *Chevron*, and instead following legislative history, the Third Circuit has left the field in disarray. Pension plans and employers are left to guess as to what constitutes a complete withdrawal.

III. THE COURT BELOW EXPANDED THE STATUTE TO IMPLEMENT "CONGRESSIONAL INTENT" CONTRARY TO THIS COURT'S RULING IN *WEST VIRGINIA UNIVERSITY HOSPITAL v. CASEY*.

By amendment to ERISA Congress repealed some of MPPAA's retroactivity. Section 558 of the Deficit Reduction Act of 1984 ("DEFRA"). In chief the amendment brought the effective date of MPPAA forward to the

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[26] PBGC lost the case. The Second Circuit, like the district court, apparently never found or, wisely, ignored the legislative history. *Solar*, 666 F.2d 28, (2d Cir. 1981).

Solar was a uniquely pre-MPPAA case where there were no statutory partial withdrawals. In the post-MPPAA (and post-*Solar*) world of 70% decline partial withdrawals, "virtually complete" withdrawals (and potential for employer manipulation) ceased to be a concern to PBGC.

September 26, 1980 enactment date thereby relieving employers who had withdrawn prior to the enactment date of any withdrawal liability. In addition Congress excepted from withdrawal liability certain other employers who withdrew after September 25, 1980, and before December 31, 1980, if the employer had entered into a "binding agreement to withdraw" before September 26, 1980.[27] DEFRA § 558(d). Thus even if the Third Circuit were right that Crown Cork "virtually withdrew" before December 31, 1980, it was still necessary to find a binding agreement to withdraw if Crown Cork were to escape liability.[28]

The Third Circuit's analysis is curious. It began with the proposition that the statutory phrase "binding agreement to withdraw" is ambiguous (as it must if it is going to depart from the words of the statute), but the court could not have meant ambiguous in the usual sense of the word—possessing more than one meaning. To the contrary the court was concerned that the term was too narrow—possessing too little meaning. App. A, at 11a. Yet the court did not find that the statute was meaningless or absurd. Indeed it found relevant legislative history and case law giving examples of binding agreements to withdraw. The court determined, however, that these examples were too unlikely to occur and thus did not provide sufficient substance to Congress' intent.

> [W]e do not believe that Congress intended to limit DEFRA's application to those situations in which

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[27] MPPAA was enacted on September 26, 1980, but was originally made effective April 29, 1980. *See PBGC v. R. A. Gray*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). DEFRA was enacted one month after the *R. A. Gray* decision.

[28] The arbitrator, who was factfinder below, found that Crown Cork had no binding agreement to withdraw. The district court recharacterized the question as purely legal and reversed. The court of appeals also disregarded the arbitrator's findings. The arbitrator's findings should have been presumed correct by both courts. Only, as the Third Circuit ruled, if there is no need for a real binding agreement may the arbitrator's findings be bypassed.

> a union, or any other party, had consented to the employer's withdrawal from the plan.
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> * * * *
>
> We believe that Congress, in requiring some type of "binding agreement to withdraw," intended to exclude from withdrawal liability those employers whose actions effectively and irrevocably committed them to withdrawing from a multiemployer plan before September 26, 1980.

App. A, at 12a-14a. Where did the Third Circuit find this standard? It cites absolutely no authority except for its own belief in what Congress meant.[29] On this basis the court held that while Crown Cork had no binding agreement to withdraw, its plant closing notice and listing agreement served a sufficiently similar purpose to satisfy the statute.

In *West Virginia University Hospitals, Inc. v. Casey*, —— U.S. ——, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), this Court rejected the notion that it is the court's duty to ask how Congress would have decided a question had Congress actually considered it. "This argument profoundly mistakes our role. . . . [I]t is not our function to eliminate clearly expressed inconsistency of policy. . . ." *Id.* at 1148. Similarly this Court has stated:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by

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[29] While Congress could have used those words, it did not. Maybe Congress intended that its exception be very narrow—perhaps limited to only a single employer (and not Crown Cork). This, after all, is precisely what Congress did in adding 29 U.S.C. § 1461(h)(1), to benefit only Lady Baltimore Foods, Inc. *See Central States Pension Fund v. Lady Baltimore Foods*, 960 F.2d 1339 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992). There is no rule of construction that disfavors a narrow construction. Moreover, a narrow construction is also consistent with the rule of construction that exceptions to a remedial statute (MPPAA) are read narrowly.

> inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Iselin v. United States, 270 U.S. 245, 250-251, 46 S.Ct. 248, 250, 70 L.Ed. 566 (1926).

Moreover, the Third Circuit had, but ignored, the agency's views on this question as well. PBGC had urged the court not to expand the scope of the statute. App. F, at 60a. Its ignoring of the agency interpretation was thus in conflict with *Chevron*.

In sum, the court below ignored the plain meaning rule and without turning to any legitimate rule of construction simply announced Congress' intent and supplemented the statutory text with it. This Court should issue the writ of certiorari to correct the Third Circuit's error.

IV. THE THIRD CIRCUIT'S DECISION CREATES A PROBLEM OF NATIONAL IMPORTANCE BECAUSE MULTIEMPLOYER PENSION PLANS ARE LEFT TO GUESS WHAT LAW APPLIES; THE THIRD CIRCUIT'S RULING LACKS ANY MEANINGFUL STANDARD FOR DETERMINING WHEN A WITHDRAWAL OCCURS.

Multiemployer pension plans can no longer be certain what constitutes a complete withdrawal and when it occurs. If the Third Circuit is right, then a plan need not wait until the last contribution is made before it assesses for a complete withdrawal. But when should it act? Is a "substantial cessation" a 70% decline? 90%? 98%? Plan trustees are fiduciaries whose sole duty is to participants. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 101 S.Ct. 672, 69 L.Ed.2d 672 (1981). The pressure upon trustees to assess as soon as possible will be immense, particularly considering the usual alternative—the four-year wait imposed by the partial withdrawal rules.[39] Of course potential withdrawal liability varies year to year with the fortunes of the plan. In some cases the

[39] A 3-year testing period, 29 U.S.C. § 1385(b)(1), plus another year to establish the pro-ration fraction, 29 U.S.C. § 1386(a)(2)(A).

plan will want to wait until January 1 to assess a larger liability (or may hurry to assess by December 31, as the case may be). Obviously the price of the Third Circuit's decision is high considering potential litigation alone.

The only guidance for the meaning of "substantial cessation" is the test afforded by "substantially all" under 29 U.S.C. § 1383(d)(2).[31] The Seventh Circuit has approved an 85% test to define that inherently ambiguous term. *See Continental Can*, 916 F.2d 1154. Coincidentally that falls halfway between the minimum decline defining a partial withdrawal (70%) and the maximum (100%) decline. Thus, if that is the test, fully half of all partial withdrawals may actually be complete withdrawals. Under the Third Circuit rules, trustees of virtually all multiemployer plans have routinely failed to timely collect in half of their partial withdrawal cases—a chilling thought for a fiduciary.

Adding the inherent ambiguity of "normal business operations" to the flexible term "substantial" invites continuing conflicts. Combining these problems with those created by the conflict in the Circuits (Section I, *supra*), it is evident the problem is neither trivial nor uncommon. Virtually all multiemployer plans find a substantial number of their partial (and complete) withdrawals exposed to hopeless uncertainty to be resolved case by case (and surely in almost every case) by the courts.

Multiemployer plans should not be left to flounder. The problem is urgent (as the Pennsylvania Truck Lines case shows). Plans make daily decisions on whom and when to assess withdrawal liability. The problem cannot be clarified by further case by case development of the circuit law. Each new decision would only add further complications and new forums for attack by one or the

[31] The Third Circuit apparently abandoned the test (a 98% decline) suggested by the legislative history to define a "virtually" complete withdrawal in favor of its own "substantial cessation" test.

other party, at great cost ultimately to the very participants the statute was designed to protect. This Court's guidance is urgently needed now. The petition for a writ of certiorari should be granted and the Third Circuit reversed.

CONCLUSION

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in order to resolve the conflict between it and the Seventh Circuit. This Court should also grant the petition because the Third Circuit decision conflicts with this Court's rulings mandating deference to plain meaning and deference to agency interpretations of statutes.

Respectfully submitted,

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
NEAL S. DEODHAR
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(708) 518-9800
Attorneys for Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

Filed December 23, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1345

CROWN CORK & SEAL COMPANY, INC.

vs.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a Federal multiemployer employee pension benefit plan; LORAN W. ROBBINS; MARION M. WINSTEAD; ROBERT C. SANSONE, ROBERT J. BAKER; HOWARD MCDOUGALL; ARTHUR H. BUNTE; R. JERRY COOK and R. V. PULLIAM, its present trustees in their fiduciary capacity(ies)

(D.C. Civil No. 84-05737)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust; MARION M. WINSTEAD; ROBERT C. SANSONE; ROBERT J. BAKER; HOWARD MCDOUGALL; ARTHUR H. BUNTE, JR.; R. JERRY COOK; R. V. PULLIAM, SR.; HAROLD D. LEU, is present trustees

vs.

CROWN CORK & SEAL COMPANY, INC.

(D.C. Civil No. 91-04423)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and its trustees, including MARION M. WINSTEAD, ROBERT C. SANSONE, ROBERT J. BAKER, HOWARD MCDOUGALL, ARTHUR H. BUNTE, JR., R. JERRY COOK, R. V. PULLIAM, SR. and HAROLD D. LEU,

Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Argued

November 16, 1992

Before: MANSMANN, HUTCHINSON and GARTH,
Circuit Judges

(Filed: December 23, 1992)

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

Crown Cork & Seal Company, Inc., sought to obviate, under the Deficit Reduction Act of 1984 ("DEFRA"), its withdrawal liability to its multiemployer pension plan when it ceased production at its St. Louis Plant in 1980. In order to seek the benefits of DEFRA, the company must show that (1) it had a binding agreement to withdraw from a multiemployer plan as of September 26, 1980 and (2) that it effectuated a complete withdrawal from the plan by December 31, 1980.

In this appeal we must interpret the term, a "binding agreement to withdraw," within the meaning of Section 558(d) of DEFRA and must determine whether a cessation of virtually all covered operations satisfies the complete withdrawal requirement of § 1383(a)(2) of the Multiemployer Pension Plan Amendments Act ("MPPAA") to ERISA.

We hold that an employer's actions committing it to withdraw from a multiemployer pension plan by announcing its plant closing, bargaining with its unions over the effects of that closing and signing a listing agreement placing its plant for sale satisfy the language and statutory purpose of DEFRA's requirement of a "binding agreement to withdraw." We further hold that an employer has completely withdrawn when it ceases its normal business operations in preparation for a shutdown. Accordingly, we will affirm the judgment of the district court exempting Crown Cork from withdrawal liability in closing its St. Louis Plant.

I.

In 1980, economic conditions and decreased demand for three piece cans convinced Crown Cork to close its St. Louis can manufacturing plant. On July 28, 1980, Harold Abrams, Crown Cork's Director of Industrial Relations, sent a letter to each of the four unions that represented employees at the St. Louis plant, informing them that the company had made a final decision to close the plant. In those letters Abrams stated that Crown Cork "expected that the closing [would] occur by the end of September, 1980."

Production and maintenance employees, as well as some clerical employees, were represented by Local 688 of the International Brotherhood of Teamsters (Local 688).[1]

[1] Under its collective bargaining agreement with Local 688, Crown Cork was obligated to make pension contributions to the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund").

On July 31, 1980, Local 688's business representative, Ken DeGrande, sent a letter acknowledging receipt of Abrams' letter "regarding the closing of the St. Louis plant" and requesting that Abrams meet with him "as rapidly as possible to negotiate the effects of the closing." On August 13, 1980 and several occasions thereafter, Abrams met with DeGrande to negotiate the effects of the closing, including severance pay, vacation pay and related matters. Local 688 did not, however, challenge the company's decision to close the plant.

Crown Cork proceeded to implement its decision by a massive reduction in its work force. As a result of layoffs, terminations and transfer, only 9 of Crown Cork's 29 management employees remained at the St. Louis Plant after September 26th; 44 of the 148 production and maintenance workers remained; of 12 clerical workers, only 4 remained.

On September 16, 1980, Crown Cork's Director of Production Control, Donald Kirkpatrick, issued an internal mailgram to managers notifying them that the St. Louis plant would close at the end of business on September 26, 1980, and that all orders placed at the St. Louis plant should be switched to another point of manufacturing before then. After this date, there was no new can production at the St. Louis plant. Finish-up work consisting of assembling remaining materials into cans amounting to a field of 265 production line-hours was performed in October. This "finish up" work was completed by October 10, 1980; thereafter, the only work performed at the St. Louis plant consisted of tasks incidental to the final closing of the plant; dismantling, maintenance, clean-up and disposal of equipment and property.

On September 23, 1980, Crown Cork entered into a listing agreement with Turley Martin, a real estate broker, to sell the plant. The St. Louis plant was ultimately sold on June 3, 1982.

Additional layoffs and terminations followed and by December 31, 1980, only three members of Local 688's production and maintenance unit and only one member of Local 688's clerical unit were still employed at the St. Louis Plant, performing shut down work. Crown Cork's last production and maintenance employee was placed on layoff on November 6, 1981. From October, 1980 through November, 1981 Crown Cork continued to submit employee work history reports for these few remaining employees and continued to contribute to the Pension Fund on their behalf.

In a letter dated October 26, 1983, pursuant to 29 U.S.C. § 1399(b)(1), the Pension Fund sent Crown Cork a notice and demand for the payment of withdrawal liability in the amount of $31,802.75 monthly, beginning January 1, 1984 or alternatively as a lump sum amount of $1,319,859.30 (based upon a withdrawal date of November 28, 1981). On December 20, 1983 the Pension Fund sent Crown Cork a "past due" notice. Subsequently, on December 30, 1983, Crown Cork requested that the Pension Fund review its withdrawal liability determination in accordance with 29 U.S.C. § 1399(b)(2)(A). On March 23, 1984, pursuant to 29 U.S.C. § 1399(b)(2)(B), the Pension Fund responded to Crown Cork's review request.

In November, 1984, after exhausting review with the Pension Fund, Crown Cork filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that it did not owe the Pension Fund withdrawal liability because it was exempt from such liability under DERFA. On December 30, 1988, the district court granted summary judgment in Crown Cork's favor based upon its DEFRA defense. The district court found that Crown Cork had a "binding agreement to withdrawal" in effect before September 26, 1980, and had accomplished a complete withdrawal by December 31, 1980. The Pension Fund appealed.

On July 14, 1989, we held that Crown Cork's DEFRA claim should be submitted to arbitration before being subject to judicial review. Accordingly, we reversed the order granting Crown Cork summary judgment and remanded the case to the district court for entry of an order to "defer the matter to arbitration" pursuant to 29 U.S.C. § 1401(a)(1) (1982). *Crown Cork & Seal Co. Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 881 F.2d 11, 19-20 (3d Cir. 1989) ("*Crown Cork I*").

After some procedural maneuvering,[2] the case was ultimately submitted to arbitration on the basis of a stipulated record. Arbitrator James Clair Duff issued an Opinion and Award on January 15, 1991 in which he rejected Crown Cork's DEFRA defense and found, instead, in favor of the Pension Fund. Arbitrator Duff retained jurisdiction to determine any amounts due and owing, issuing his final award on June 7, 1991 in which he assessed Crown Cork $2,072,247.08 in withdrawal liability.[3]

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[2] On September 13, 1989 the Pension Fund filed an action in the United States District Court for the Northern District of Illinois, *Central States, etc., et al. v. Crown Cork & Seal Co.*, No. 89-6943 (N.D. Ill. March 7, 1990), to enforce a claim it had made for interim payments. The Illinois action was stayed pending disposition of the case in the Eastern District of Pennsylvania.

On October 23, 1989, the United States District Court for the Eastern District of Pennsylvania entered an order on remand which directed the parties to proceed promptly to arbitration, stayed the matter pending arbitration and enjoined further proceedings in Illinois. The Pension Fund appealed this order. At our urging, a stipulation was entered which resulted in the dismissal of that appeal. *Crown Cork & Seal Co. v. Central States Southeast, etc., et al.*, No. 89-2014. Order and Motion (3d Cir. May 25, 1990). As part of this stipulation, Crown Cork commenced interim monthly payments to the Pension Fund in June, 1990.

[3] The arbitrator interpreted DEFRA's requirement of a "binding agreement to withdraw" as requiring "the existence of an en-

Subsequently, Crown Cork filed a motion to vacate the arbitration award. The Pension Fund responded with a motion for summary judgment to enforce the award. On March 30, 1992, the district court granted Crown Cork's motion to vacate the arbitration award, holding that Crown Cork was exempt from withdrawal liability because it had met DEFRA's requirements.

The district court had jurisdiction under 29 U.S.C. § 1401(b)(2) (1988) (any party to an arbitration proceeding can request judicial review no later than thirty days after issuance of an arbitrator's award in appropriate federal district court). In such cases, the district court presumes that the arbitrator's factual findings are correct unless they are rebutted by a clear preponderance of the evidence. 29 U.S.C. § 1401(c); *Huber v. Casablanca Industries*, 916 F.2d 85, 89 (3d Cir. 1990), *petition for cert. filed* (Jan. 9, 1991). The arbitrator's legal conclusions are reviewed *de novo*. *Id.*

We have jurisdiction over appeals from final judgments of district courts pursuant to 28 U.S.C. § 1291. In *Crown Cork I*, we characterized the questions of whether Crown Cork had a binding agreement to withdraw and whether covered operations at the St. Louis plant had permanently ceased as mixed questions of law and fact. *Crown Cork I*, 881 F.2d at 18 n.19. In reviewing mixed questions such as these, we apply a clearly erroneous standard to findings of fact and conduct plenary review of conclusions of law, applying the appropriate standard to each component. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989).

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forceable agreement on or before September 26, 1980 committing Crown Cork to sell its assets." The arbitrator found that Crown Cork's listing agreement with Turley Martin was not "a vehicle to force Crown Cork to sell its plant if it chose not to." Award at p.7.

II.

Multiemployer pension plans such as the Pension Fund are subject to the provisions of the Employee Retirement Income Security Act, ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1974). ERISA's central purpose is to protect the security of employee pension plans and to insure that benefits which have vested are paid to employees. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984).

Under ERISA, an employer who withdrew from a multiemployer pension plan could be liable in some circumstances for a share of the unfunded portion of vested benefits in the plan. 29 U.S.C.§§ 1363-64. ERISA provided, however, that if the pension plan survived for five years after an employer withdrew, the employer would not be liable for any unfunded benefits should the plan fail sometime after five years. 29 U.S.C. §§ 1363(c) (1982). Acting at least partly out of a concern that many employers were withdrawing from multiemployer plans on the gamble that the plan would survive for five years after their departure, and to ensure that the plans had sufficient funds to pay benefits which had already vested, Congress enacted the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 *et seq. Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760 (6th Cir. 1987) (citing H.R. Rep. No. 96-869, 96th Cong., 2d Sess. 52-57 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2920-25).

Under the MPPAA, an employer who withdraws from a multiemployer pension plan becomes obligated to pay a proportionate share of the plan's unfunded vested benefits. This debt is known as withdrawal liability. Although MPPAA was enacted on September 26, 1980, Congress gave the statute retroactive effect in order to "prevent employers from taking advantage of a lengthy legislative process and withdrawing while Congress de-

bated necessary revisions in the statute." *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 723 (1984).

The U.S. Supreme Court held MPPAA's retroactive provision constitutional. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co., supra.* One month later, however, Congress passed the Deficit Reduction Act of 1984, which included a provision that amended MPPAA's effective date. Congress' reasons for legislatively eliminating MPPAA's retroactive effect were twofold. The Senate Finance Committee found that the retroactive application of MPPAA had an unduly burdensome effect on employers that withdrew between April and September, 1980 and was unnecessary to preserve the financial integrity of multiemployer plans. *Long Island Oil Products Co. v. Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir. 1985).

Section 558 of DEFRA, entitled "Elimination of Retroactive Application of Amendments Made by Multiemployer Pension Plan Amendments Act of 1980," provides in section (a)(1) that any withdrawal liability incurred by an employer as a result of a partial or complete withdrawal before September 26, 1980 is void. For those employers who have not completely withdrawn by September 26, 1980, DEFRA contains a special provision for transactions in which a binding agreement to withdraw from a multiemployer plan was entered into before September 26, 1980, giving employers until December 31, 1980 to effectuate a complete withdrawal.[4] *See* Section 558(d).

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[4] Section 558 provides in relevant part:

> Elimination of Retroactive Application of Amendments Made by Multiemployer Pension Plan Amendments Act of 1980.
>
> (a) In General—
>
> (1) Liability. Any withdrawal liability incurred by an employer pursuant to part 1 of Subtitle E of title IV of the

III.

Application of DEFRA to the facts of this case raises two questions. First, did Crown Cork have a binding agreement to withdraw by September 26, 1980? If so, did a complete withdrawal occur before the end of 1980?[5]

A.

The district court found that Crown Cork's notice to its unions of plant closing and subsequent "effects" bargaining along with its real estate listing agreement met the language and statutory purpose of DEFRA and thus concluded that Crown Cork had a binding agreement to withdraw before September 26, 1980. In so finding, the district court held that the true purpose behind § 558(d) of DEFRA is to allow exemptions from withdrawal liability to those employers, who, in good faith, effectively and irrevocably were committed to withdrawing from a multiemployer pension plan before September 26, 1980.

Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1381 *et seq.*) as a result of a complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980 shall be void.

* * * *

(d) Special Rule For Certain Binding Agreements—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting 'December 31, 1980' for 'September 26, 1980.'

Pub. L. No. 98-369, 98 Stat. 494,899, *reprinted in* "Historical Note" accompanying 29 U.S.C.A. § 1381 (1985).

[5] Arbitrator Duff did not reach the issue of whether, in fact, Crown Cork had effectuated a complete withdrawal before December 31, 1980, because he concluded that Crown Cork did not have a binding agreement to withdraw. However, he did find that "de facto Crown was committed to its plan to close the St. Louis Plant" before September 26, 1989. (A. 1012).

Interpreting the meaning of DEFRA's requirement of a "binding agreement to withdraw" is not an easy task. DEFRA does not contain a definition of a "binding agreement to withdraw" and the legislative history of this provision is scant. The only reference in the legislative history to what might qualify is a reference made to a binding sale[s] agreement.[6]

In the few cases which have come before the courts, the meaning of "binding agreement to withdraw" has been construed narrowly. For example, the statute was deemed satisfied where an executed agreement of sale existed prior to September 26. *Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760 (6th Cir. 1987). *See also Debrecent v. Outlet Company*, 784 F.2d 13, 17 (1st Cir. 1988) (agreement of sale dated before, but executed after, September 26, 1980 did not constitute a binding agreement as to that date and thus did not satisfy DEFRA); *Salem Laundry Co. v. New England Teamsters and Trucking Industry Pension Fund*, 829 F.2d 278 (1st Cir. 1987) (conduct of the parties through negotiations supported an inference that they did not intend to be bound until a formal contract [of sale] was executed).

Here, the district court fund that a literal reading of "binding agreement to withdraw from a multiemployer plan" would create an ambiguity because an employer cannot "agree" to withdraw from a plan. "Rather, the employer may take definitive action, such as discontinuing operations, which results in withdrawal." Opinion at

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[6] "Under the bill, in the case of an employer who, on September 26, 1980, had a binding sale agreement to withdraw from a multiemployer plan, the effective date of withdrawal liability is changed to December 31, 1980." Staff of Joint Committee on Taxation, 98th Cong., 2d Session, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, at 893 (1985) (General Explanation).

p. 15. Therefore, the district court held that a more expansive reading of the language was required.

We agree with the district court that this phrase is ambiguous.[7] Any attempt to interpret literally the language of this phrase raises several questions about the nature of the agreement itself: Who would be the parties to a binding agreement to withdraw? A union? A pension fund? What provisions would underlie such an agreement?

The Pension Fund asserts that an employer and a union could enter into an agreement which provides that on a certain date an employer's contributions to a multiemployer pension plan would cease and cites *Robbins v. Lady Baltimore Foods*, 868 F.2d 258 (7th Cir. 1989). There, DEFRA's "binding agreement to withdraw" requirement was satisfied by a provision in the parties' collective bargaining agreement which called for the cessation of contributions to the pension fund on a specified date. That such an agreement actually existed in *Lady Baltimore Foods* does not convince us that this is the *only* type of agreement that satisfies DEFRA and "binds" an employer into withdrawing from a multiemployer pension plan. We do not believe that Congress intended to limit DEFRA's application to those situations in which an employer's withdrawal was foreseeable and the employer had executed an agreement with its union in advance of the situation. Economic reality indicates that, in many situations, an employer may not anticipate having to close its business, with the consequence of withdrawing from a multiemployer pension plan. Moreover, we do not believe that Congress intended to limit

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[7] The issue is not only whether an employer "could" form an agreement to withdraw from a plan, but whether it is likely that anyone would agree to be bound by it. Counsel for the Pension Fund conceded as much at oral argument when he noted that it was unlikely that the Pension Fund would have signed such an agreement had Crown Cork presented it.

DEFRA's application to those situations in which a union, or any other party, had consented to the employer's withdrawal from a plan. Thus "consent", by either a union or a pension fund, is not required as a condition precedent to an employer's prerogative to make a business decision simply because that decision results in the employer's withdrawal from a multiemployer pension plan.

We thus turn to Congress' intent in enacting DEFRA. In enacting DEFRA, Congress had concluded that MPPAA's retroactive effective date was unduly harsh because it imposed significant unexpected liability on employers who withdraw before the statute was enacted. Moreover, it was discovered that retroactive application of MPPAA was unnecessary to preserve the financial integrity of the plans.[8] In enacting DEFRA, Congress singled out a group of employers it believed was treated unfairly under MPPAA. We believe that Congress, in requiring some type of "binding agreement to withdraw," intended to exclude from withdrawal liability those employers whose actions effectively and irrevocably com-

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[8] Congress made two findings in enacting DEFRA and removing MPPAA's retroactivity provision. First, Congress recognized that most of the employers who withdrew between April 29 and September 26, 1980 would have done so regardless of the effective date of MPPAA because these employers had valid reasons extrinsic to MPPAA for withdrawing from their multiemployer pension plans. Congress further recognized that many employers who withdrew during the period of retroactivity not only did not do so in anticipation of MPPAA, but were instead surprised by its enactment. Because these employers had failed to anticipate the retroactive withdrawal provisions, they were exposed to large unexpected liabilities. *Long Island Oil Products Co. v. Local 553 Pension Fund*, 775 F.2d 24, 28 (2d Cir. 1985). Here too, Crown Cork's July, 1980 decision to close the St. Louis Plant was a legitimate business decision based on decreased demand for its product. Indeed, the district court found that there were no bad faith attempts on the part of the company to alter its course of conduct to avoid withdrawal liability. Opinion at p. 17.

mitted them to withdrawing from a multiemployer pension plan before September 26, 1980.

Crown Cork's actions prior to September 26, 1980, to accomplish this objective are undisputed. Its announcement of its plant closing occurred in July. Immediately thereafter Crown Cork's unions were notified, negotiations over the effects of the closing were held, massive layoffs and transfers occurred, and work already in progress was "finished up" in preparation for a complete shutdown. In sum, a total liquidation was in progress. These actions carried with them legally binding obligations and ramifications, such as Crown's duty to bargain over the effects of its closing with its unions. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 n.15 (1981).

In addition to these commitments Crown Cork had entered into a listing agreement with Turley Martin, a real estate broker, obligating Crown Cork to sell the plant if the broker produced a ready, willing and able buyer. If Crown Cork did not go through with the sale, it would suffer substantial financial penalties. These actions "bound" Crown Cork to withdraw as effectively as any contractual agreements.

We cannot ignore the economic reality that factory facilities are not readily sold. Most commercial or business transactions are not simple, one-step transfers, but multi-step arrangements beginning with an agreement and ending with a final closing, often many months later. *Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760, 765 (6th Cir. 1987). In this case, Crown Cork's listing agreement with Turley Martin resulted in an agreement of sale executed on June 3, 1982, close to two years after Crown Cork's decision to sell the plant and terminate operations. We see no reason to distinguish between those employers who, through good fortune or favorable market conditions, were able to conclude their business through a sale to a ready, willing and able buyer, and those who had made

an economic decision to close their business and had taken concrete steps to accomplish this objective but were unable to secure a ready buyer.

B.

Having concluded that Crown Cork satisfies DEFRA's first requirement, we turn now to the issue of whether a complete withdrawal occurred before December 31, 1980. Under the MPPAA, a complete withdrawal occurs in one of two separate and distinct ways, when an employer either: "permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383 (a)(2). The first test focuses on the employer's contribution of funds to a multiemployer pension plan. The second test defines withdrawal based on the status of an employer's "covered operations." Admittedly Crown Cork does not meet the contributions test for withdrawal because Crown Cork continued to make contributions to the Pension Fund until November, 1981. The date of a complete withdrawal is defined as "the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. § 1383(e).

The district court found that, for all practical purposes, Crown Cork had suspended its operations by December 31, 1980, thus effecting a complete withdrawal. The district court accepted these undisputed facts: Crown Cork had terminated or transferred most of its employees before the end of September, 1980; those employees who remained at the plant were engaged in "finishing up" work of a *de minimis* nature; production line-hours in October, 1980 totalled 265 line-hours, representing roughly 5% of a typical pre-closure monthly total of 4,419 line hours; as of September 26, 1980 no new orders were processed at the St. Louis plant; after October 10, 1980 all production activity ceased and the only remaining activities at the plant consisted of tasks incidental to clos-

ing; after December 31, 1980 the only employees remaining at the plant were three production and maintenance workers, one clerical worker and four management employees.

In its appeal, the Pension Fund argues that Crown Cork did not completely withdraw from the Pension Fund until November 6, 1981, when its last production and maintenance employee was laid off and it ceased making *any* contributions on behalf of this employee to the Pension Fund.[9] The Pension Fund relies on the decision of the United States Court of Appeals for the Seventh Circuit that a complete withdrawal does not occur until all, that is, one hundred percent of an employer's covered operations, cease. In *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989), the Court of Appeals held that § 1383(a)(2)'s clear and unambiguous language required that *all* (100%) of the covered operations must permanently cease before an employer has completely withdrawn from a plan. The court reversed the decision of the district court which held it sufficient if "virtually all" covered operations came to a halt. 872 F.2d at 212. The Court of Appeals interpreted "covered operations" under ERISA as referring to those

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[9] The Pension Fund asserts that because Crown Cork was obligated to contribute to the plan until November, 1981, it did not effect a complete withdrawal until these contributions ceased.

Crown Cork counters that, in order for "cessation of operations" to have a meaning separate from "cessation of contributions", it must be construed to mean the cessation of production activity. Crown Cork maintains that if "cessation of operations" is limited to what the Pension Fund claims, every cessation of operations would necessarily be a cessation of contributions to the plan. By equating "operations" to that which is necessary to produce a "contribution," the Pension Fund is making a cessation of the obligation to contribute the sole test of "withdrawal." This would render the definition of withdrawal that turns on the cessation of operations a nullity.

operations covered by the collective bargaining agreement for which the employer must contribute to the pension plan. 872 F.2d at 214 n.10. The issue was characterized as "whether bargaining unit work is being performed for which contributions are being made," not simply whether production work is being performed.[19]

We are influenced again by the legislative history of these statutes. In the Report of the House Committee on Education and Labor discussing MPPAA's section 1383 (a)(2), the following statement is instructive:

> It is intended, however, that a *complete withdrawal occurs as under current law, where an employer has ceased virtually all operations* at the facility for which the employer makes contributions to the plan.

H. Rep No. 96-869, Pt. I, 96th Cong., 2d Sess. 73, *reprinted in* 1980 U.S.C.C.A.N. at 2936 (emphasis added). In addition, a report drafted by the Senate's Labor and Human Resources Committee, discussing the requirement that a cessation of operations be permanent, indicates that when Congress used the term "operations" it meant normal business activity:

> The committee intends that covered operations be treated as having permanently ceased when business activity substantially ceases or when it continues but no longer gives rise to contributions to the plan.

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[19] The parties before us have stipulated that the sole activities after October 10, 1980 were tasks performed by just four employees incidental to plant closing. The Allied Products Company in *Allied Products* could not make this claim. Although Allied informed its union in June 1982 of its intent to close its Bedford plant, the court, found that Allied still received, processed and filled seven purchase orders during 1983. 872 F.2d at 209. Thus normal business activity and normal operations, and not just shut down work, had continued past the withdrawal date in dispute. In contrast, Crown Cork had completely ceased production well before the date the Pension Fund claims for withdrawal.

S. Rep. 1076, 96th Cong., 2d Sess. at 12, 13. And from the Report of the House Commitee on Education and Labor discussing MPPAA:

> Current law does not define a withdrawal. As under current law, a virtually complete cessation of contributions, *e.g.*, a 98 percent reduction, that has the same effect on the plan as a complete cessation of contributions is a complete withdrawal.

H.R. Rep. No. 96-869, Pt. I, 96th Cong., 2d Sess. 73, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2941.

We find that the statutory language "all covered operations" is not sufficiently clear and free from ambiguity as to stand on its own. Resort to legislative history is thus mandated. Indeed, we find that two of the terms contained in that phrase, specifically "covered" and "operations," cannot be defined without resort to it. Our examination of the legislative history leads us to conclude that substantial cessation of normal business activity meets the complete withdrawal standard.

We also join those district courts which have focused on the type of work in which the employer was normally engaged—its true operations. Where it was clear that an employer had ceased its normal business operations in preparation for a shut down, these courts have held that the performance of non-operational tasks incidental to a total closing of the facility does not prevent the court's finding that a complete withdrawal has occurred.[11] Thus,

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[11] *See, e.g., Speckman v. Barford Chevrolet Co.*, 535 F. Supp. 488 (E.D. Mo. 1982) (a complete withdrawal can occur even if the employer retains employees on its payroll to terminate the business, thus a car dealership which had terminated all but one of its employees from a preclosure work force of 18, to assist the employer in the winding up of the employer's automobile dealership business and whose remaining employee was not engaged in selling cars had completely withdrawn); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 607 F. Supp. 570 (S.D. N.Y. 1985) (employer was not obligated to pay withdrawal assessments

we find the district court did not err as a matter of law in finding a complete withdrawal had occurred for DEFRA purposes.

IV.

We conclude that the district court did not err in finding Crown Cork exempt from withdrawal liability because it complied with DEFRA. Accordingly, we will affirm the decision of the district court.

A True Copy:

Teste:

Clerk of the United States

Court of Appeals for the Third Circuit

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even though it maintained skeleton crew of three employees to aid in clean up work and dismantling or a dye and textile plant and made contributions on behalf of these employees); *Connors v. Economy Bldg. Systems*, 651 F. Supp. 849 (D.D.C. 1986) (court determined that employer had completely withdrawn when it ceased "the business activity that gave rise to contributions to the plan, *i.e.*, construction activity); *F.H. Cobb Co. v. New York State Teamsters Conference Pension & Retirement Fund*, 584 F. Supp. 1181 (N.D. N.Y. 1984) (where employer retained a small group of employees, ranging in number from nine to sixteen and representing between 5-9 percent of the company's preclosure workforce to move inventory and equipment, employer had ceased covered operations under MPPAA). *Accord ILGU National Retirement Fund v. Weatherall Fashions, Inc.*, No. 94-Cir. 9722, slip op. 1986 W.L. 2757 (S.D. N.Y. 1986). *But see Combs v. Leishman*, 691 F. Supp. 424 (D.C. Dist. Col. 1988) (employer had not withdrawn, although its operations were winding down, where it maintained its mining activities at levels not substantially different than normal work periods).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-5737

CROWN CORK AND SEAL COMPANY, INC.,
Plaintiff and Counter-Defendant,

VS.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Defendants and Counter-Plaintiffs.

Civil Action No. 91-4423

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiff,

VS.

CROWN CORK AND SEAL, INC.,
Defendant.

MEMORANDUM OF DECISION

[Filed Mar. 31, 1992]

McGlynn, J. March 30, 1992

Before the court is plaintiff Crown Cork & Seal Company, Inc.'s ("Crown Cork") motion, pursuant to 29

U.S.C. § 1401(b)(2), to vacate an arbitration award entered on January 15, 1991 and supplemented on June 7, 1991, by Arbitrator James Clair Duff. Defendant Central States, Southeast and Southwest Areas Pension Fund ("Fund") moves for summary judgment to enforce the arbitration award and opposes Crown Cork's motion to vacate. For the reasons that follow, Crown Cork's motion to vacate the arbitration award will be GRANTED.

I. FACTUAL BACKGROUND [1]

Crown Cork is a Pennsylvania corporation with its principal place of business in Philadelphia. Crown Cork manufactures and sells cans, closures, and machinery. It previously operated a plant for such purposes in St. Louis, Missouri. In early 1980, Crown Cork's management considered closing the St. Louis plant because of outmoded facilities and economic conditions. In July, 1980, Crown Cork informed the Director of Industrial Relations, Harold Abrams, that management had made a final decision to close the St. Louis plant.

Defendant Fund is a multiemployer pension plan within the meaning of §§ 3(2), (35) and (37)(A) of ERISA, 29 U.S.C. § 1002(2), (35), and (37)(A), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), §§ 207(a) 302(a).[2] Employees at the St.

[1] The parties have stipulated to the facts underlying this case.

[2] Under ERISA, an employer withdrawing from a multiemployer pension fund could escape withdrawal liability if the plan survived for five years after the withdrawal. 29 U.S.C. § 1364 (1982). On September 26, 1980, Congress enacted the MPPAA which imposed "withdrawal liability" on any employer who withdrew from a multiemployer plan after April 29, 1980. Congress was concerned that employers were withdrawing from multiemployer plans, betting that the plans would not fail for five years. If so, the employers would not be liable for unfunded benefits under ERISA. H.R. Rep. No. 869, 96th Cong., 2d Sess., 54-55, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2922-23. Congress also gave the statute retroactive effect "to prevent employers from taking advantage

Louis plant were represented by four separate unions. Production, maintenance and some clerical employees at the St. Louis plant were represented by Local 688 of the Brotherhood of Teamsters ("Local 688"). Under an agreement with Local 688, Crown Cork made pension contributions to the Fund for those union employees.

Crown Cork's Director of Production Control notified all of Crown Cork's Vice-Presidents for Sales, Plant Managers, Production Managers, and all Sales Office Managers, as well as other senior management personnel, that the St. Louis plant would close at the end of business, on Friday, September 26, 1980.

On July 28, 1990, Abrams, the Director of Industrial Relations, sent a letter to Ken DeGrande, Local 688's Business Representative, informing him that "it is expected that the closing will occur by the end of September 1980." (Mem. of Law in Supp. of Pl.'s Mot. to Vacate Arb. Award, App. 1, Ex. B) (hereinafter "Mot. to Vacate"). DeGrande acknowledged receipt of Abrams' letter. Abrams and DeGrande met on August 13, 1980, and on several occasions thereafter to negotiate aspects of the plant closing, including severance pay, vacation pay, and other related matters. As of March 1980, 148 maintenance and production employees from Local 688 worked at the plant. After layoffs and terminations, forty-four employees remained as of September 25, 1980. Of the clerical unit employees of Local 688, twelve were employed at the St. Louis plant as of March 1980. That number was reduced to four employees as of September 25, 1980.

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of a lengthy legislative process and withdrawing while Congress debated necessary revisions in the statute." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984). Although the Supreme Court held the retroactive provisions constitutional, *see, Id.*, Congress enacted § 558 of DEFRA, which repealed the retroactive provisions of the MPPAA.

Crown Cork put the St. Louis plant up for sale by listing it with a real estate broker, Turley Martin Company. According to the listing contract, if a qualified buyer was produced, Crown Cork was obligated to pay a commission whether or not a sale came to fruition.

As of October 10, 1980, production activities at the plant had ceased. The remaining work at the plant consisted of final clean-up, maintenance, dismantling, and disposal of equipment and property. By December 31, 1980, only four Local 688 member employees remained: three from production and maintenance, and one member from the clerical unit. The last production and maintenance unit employee was laid off on November 6, 1981.

II. PROCEDURAL HISTORY

On November 2, 1983, the Fund asserted that Crown Cork owed over $1.3 million in withdrawal liability, pursuant to the MPPAA. Denying any withdrawal liability, Crown Cork filed this suit for declaratory judgment in November, 1984. Crown Cork asserted that the Deficit Reduction Act of 1984 ("DEFRA"), Pub. L. No. 98-369, § 558(a) & (d), 98 Stat. 494 (1984), *reprinted at* 29 U.S.C. § 1381 Note,[3] exempted it from withdrawal

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[3] DEFRA provides in pertinent part:

> (a) In general.—
>
> (1) Liability.—Any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of title IV of the Employee Retirement Income Security Act of 1974 . . . as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void.
>
> . . .
>
> (d) Special rule for certain binding agreements.—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting "December 31, 1980" for "September 26, 1980."

Pub. L. No. 98-363, § 558(a) & (d), 98 Stat. 494 (1984), reprinted at 29 U.S.C. § 1381 Note (1984).

liability. Crown Cork maintained that it had an egreement to withdraw and that all normal operations ceased before September 26, 1980, thereby complying with the exemption terms of the statute. In the alternative, Crown Cork argued that it had made a "binding agreement to withdraw" by September 26, 1980, even if it had not withdrawn by that date. On the absence of disputed facts, both parties filed motions for summary judgment. This court granted Crown Cork's motion for summary judgment and denied the Fund's cross motion in an order issued on December 30, 1988.

The Fund appealed to the United States Court of Appeals for the Third Circuit. *Crown Cork & Seal Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 881 F.2d 11 (3d Cir. 1989). The Third Circuit affirmed the order denying the Fund's cross motion and reversed the order granting Crown Cork's summary judgment motion. The Court remanded the case to the district court with instructions to "defer the matter to arbitration" pursuant to 29 U.S.C. § 1401(a)(1) (1982). *Id.* at 19-20.

Within sixty days of the Third Circuit's decision, the Fund demanded interim payments of withdrawal liability pursuant to 29 U.S.C. § 1401(d) (1982)[4] and also demanded that Crown Cork initiate arbitration.

On September 13, 1989, the Fund initiated an action in the United States District Court for the Northern District of Illinois, *Central States, etc., v. Crown Cork & Seal Co.*, No. 89-6943 (N.D.Ill. March 7, 1990), to enforce its claim for interim payments. On October 23, 1989, this court entered an Order on Remand which directed the parties to proceed promptly to arbitration,

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[4] The MPAA empowers the court to order interim payments notwithstanding pending arbitration proceedings. *See, Debreceni v. Merchants Terminal Corp.*, 889 F.2d 1 (1st Cir. 1989); *Flying Tiger Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 704 F. Supp. 1277 (D. Del. 1989).

stayed this matter pending arbitration, and enjoined further proceedings in the lawsuit filed in the Northern District of Illinois. The Fund also was granted leave to request interim payments for the alleged withdrawal liability from this court.

The Fund appealed this order to the Third Circuit. At the urging of the Third Circuit panel hearing oral argument, a stipulation was agreed to, resulting in a dismissal of the appeal. *Crown Cork & Seal Co. v. Central States Southeast, etc., et al.*, No. 89-2014, Order and Motion (3d Cir. May 25, 1990), and provided, *inter alia*, that: arbitration, conducted *de novo*, would proceed in Chicago; this court would retain jurisdiction over this matter pending arbitration and any appeals from the arbitration process; and the lawsuit for interim payments filed in the Northern District of Illinois would be dismissed. *Id.* Furthermore, Crown Cork agreed to commence interim payments on June 1, 1990, without forfeiting any of its claims or defenses.

1. The Arbitrator's Award

The parties submitted a stipulation of facts to Arbitrator James Clair Duff.[5] In an opinion issued January 15, 1991, the arbitrator decided in favor of the Fund, rejecting Crown Cork's DEFRA defense. To clarify the liability payment schedule, Arbitrator Duff retained jurisdiction and reviewed briefs submitted by the parties. His final decision, rendered June 7, 1991, declared Crown Cork liable in the amount of $2,072,247.08 in principal and interest as of February 20, 1991, for withdrawal liability. Arbitrator Duff found:

> The facts on record do not warrant any conclusion that covered operations at the Company's St. Louis Plant had ceased before September 26, 1980 within

[5] A hearing was avoided because the facts were stipulated. Both parties submitted their arguments by brief.

> the meaning of § 558(a)(1). In addition, there is no evidence capable of sustaining a finding that as of that date Crown had a binding agreement to withdraw from the Plan within the meaning of § 558(d).

Crown Cork & Seal Co. v. Central States Southeast and Southwest Areas Pension Fund, (Amer. Arb. Assoc.) Case. No. 51 621 0022 89 V, p. 5 (1991) (Duff, Arb.) (hereinafter "Award"). Crown Cork's appeal and motion to vacate followed.

III. JURISDICTION AND STANDARD OF REVIEW

Jurisdiction of this court is predicated upon 29 U.S.C. § 1401(b)(2) (1988) (any party to an arbitration proceeding can request judicial review no later than thirty days after issuance of arbitrator's award in appropriate federal district court). The court may enforce, vacate, or modify the arbitrator's award. *Id.*

In an MPAA arbitration appeal, the arbitrator's factual findings "are presumed to be correct and are 'rebuttable only by a clear preponderance of the evidence.'" *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85, 89 (3d Cir. 1990), *petition for cert. filed*, (Jan. 9, 1991) (quoting 29 U.S.C. § 1401(c)). The arbitrator's legal conclusions are reviewed *de novo*. *Id.*

It is Crown Cork's position that the Arbitrator's award was based upon a misinterpretation of MPPAA and DEFRA § 558, and thus his misreading of the statutory language "complete withdrawal" and "binding agreement to withdraw" permit *de novo* review.[6] (Crown Cork & Seal's Reply Mem. of Law in Supp. of Mot. to Vacate, etc. p. 4-10). The Fund contends the issues are mixed questions of law and fact, and posits that "[t]hese *factual*

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[6] A question that is "purely one of statutory interpretation" under ERISA is extremely rare. *I.A.M. Nat'l. Pension Fund Plan A, A Ben. v. Clinton Engines Corp.*, No. 85-2877, mem. op. at 4, (D.D.C. Apr. 28, 1986) *aff'd Clinton Engines*, 825 F.2d 415 (D.C. Cir. 1987).

findings must be presumed correct and can only be rebutted by a clear preponderance of the evidence." (emphasis added) (Central States' Br. in Supp. of Summ. J. for Enforcement of Arb. Award and in Opp'n. to Mot. to Vacate Award, p. 13).

The Fund is correct that the issues before the arbitrator were mixed questions of fact and law. The questions on review here—whether covered operations at the St. Louis plant had ceased before September 26, 1980 and whether Crown Cork had a binding agreement to withdraw—were characterized by the Third Circuit as mixed questions of law and fact:

> [A]ssuming *arguendo* that some sort of agreement is in fact necessary to satisfy section 558's "binding agreement to withdraw" requirement, it would appear to be a mixed question of law and fact whether Crown Cork's "agreement" with Local 688 to close the plant, or its listing agreement with Turley Martin, satisfy the statutory dictates, and a predominantly factual question whether the parties intended to be bound in the requisite fashion as of September 26, 1980. *See, Warner-Lambert Co. v. United Retail & Wholesale Employee's Teamster Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986). *See also Salem Laundry Co. v. New England Teamsters and Trucking Industry Pension Fund*, 829 F.2d 278, 280 (1st Cir. 1987) (standard of review of trial court's decision that no binding agreement to withdraw existed as of September 26, 1980, is "clearly erroneous," since "'[i]t is a question of fact whether any particular conduct or actions imply a contractual understanding.'" (citation omitted)). Even if, as the district court held, no specific agreement is necessary, it would seem to be a mixed question of fact and law whether Crown Cork's activities evidences a definite commitment to withdraw by September 26. Finally, we believe

> that even the question of whether Crown Cork "permanently cease[d] all covered operations under the plan" pursuant to section 1383(a)(2) by December 31, 1980 is best characterized as a mixed factual and legal one.

Crown Cork & Seal Co. v. Central States Southeast and Southwest Areas Pension Fund, 881 F.2d 11, 18 n.19 (3d Cir. 1989).

I. Standard of Review

The MPPAA articulates no standard of review for mixed questions of law and fact. A mixed question of law and fact is described as a question in which historical facts are admitted or established, the rule of law is not in dispute, and the issue is whether the facts satisfy the statutory standard. In other words, whether the rule of law as applied to the established facts is or is not violated. *Pullman-Standard, Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 289 n.19, 102 S. Ct. 1781, 72 L. Ed. 2d 66, 80 (1982).[7]

In an appeal from an arbitration award under MPPAA, the Seventh Circuit opted for a "clearly erroneous" standard of review for mixed questions of law and fact. *Chicago Truck Drivers, etc. v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989). In matters falling outside of the MPPAA, other Circuits have rejected the clearly erroneous standard for mixed questions of law and fact. *See, e.g., Fields v. Att'y. Gen. of Maryland*, No. 90-6695, 1992 U.S. App. LEXIS 2677 (4th Cir. Feb. 26, 1992); *United States v. Mejia*, No. 91-50005, 1992 U.S. App. LEXIS 1999 (9th Cir. Feb.

[7] By definition, "'a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Allegheny Int'l., Inc. v. Synder*, No. 90-3400, slip op. at 11 (3d Cir. Jan. 21, 1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948), *quoted in Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985)).

19, 1992); *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *McDermitt v. United States*, No. 91-3267, 1992 U.S. App. LEXIS 1072 (6th Cir. 1992); *Smith v. Lockhart*, 946 F.2d 1392 (8th Cir. 1991); *In re Yeates*, 807 F.2d 874, 877 (10th Cir. 1986) (citing *Jarboe v. United Bank (In re Golf Course Builders Leasing, Inc.)*, 768 F.2d 1167, 1169 (10th Cir. 1985)).

In the Third Circuit "it is settled law that [the] court applies a clearly erroneous standard to findings of fact, conducts plenary review of conclusions of law, and must break down mixed questions of law and fact applying the appropriate standard to each component." *In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989) (citations omitted) quoted in *Allegheny Int'l., Inc. v. Snyder*, No. 90-3400, slip op at 10-11 (3d Cir. Jan. 21, 1992). *See, N.L.R.B. v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 146-48 (3d Cir. 1991) (Board determination of mixed law and fact question; factual and legal components separated and each given appropriate standard of review); *John F. Harkins Co. v. Waldinger Corp.*, 796 F.2d 657, 658-60 (3d Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987) (interpreting arbitration clause in a contract—contract interpretation is question of fact mandating clearly erroneous standard; contract construction is question of law according plenary review); *Ram Construction Co. v. American States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984) (mixed question of law and fact requires reviewing court to separate issue into respective parts and apply appropriate standard to each); *N.L.R.B. v. Pincus Bros., Inc.—Maxwell*, 620 F.2d 367, 380 (3d Cir. 1980) (Board's review of arbitrator's determination of mixed questions of law and fact applied appropriate standards to law components and fact components). *See also, United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 536 F.2d 550, 555 (3d Cir. 1976) (Board's resolution of ultimate fact or mixed question of law and fact or mixed question of law and fact entitled to some deference because within Board's special expertise);

Rosen v. N.L.R.B., 455 F.2d 615 (3d Cir. 1972) (same). *Cf., In re Brown*, 951 F.2d 564 (3d Cir. 1991) (bankruptcy); *Reese v. Fulcomer*, 946 F.2d 247 (3d Cir. 1991), *petition for cert. filed* (Jan. 13, 1992 (ineffective assistance of counsel); *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131 (3d Cir. 1991) (status of franchisee under New Jersey Franchise Act). Adopting this method of review to the matter *sub judice*, the arbitrator's fact components are presumed to be correct and are rebuttable only by a clear preponderance of the evidence. 29 U.S.C. § 1401(c). The arbitrator's legal conclusions are reviewed *de novo*. *Huber*, 916 F.2d at 89; *see, Chicago Truck Drivers*, 890 F.2d at 1411 ("Congress *did* intend [under the MPPAA] that all legal determinations by an arbitrator be subject to *de novo* review.") (emphasis in original).

The Arbitrator's first inquiry was whether covered operations at Crown Cork's St. Louis Plant had ceased before September 26, 1980. He applied the facts on record and reviewed conformity with § 588(a)(1). Therefore, Arbitrator Duff's analysis of these facts will be disturbed only if a preponderance of the evidence rebuts his conclusion. His statutory interpretation of § 558(a)(1) will be reviewed *de novo*.

The second inquiry was whether Crown Cork had a binding agreement to withdraw in place by September 26, 1980. The Arbitrator's legal interpretation that § 558(d) requires an "agreement of sale that would lead to a withdrawal from a multiemployer pension plan" and the "escape provisions of DEFRA's § 558 do not purport to be as flexible as the Company [Crown Cork] believes them to be" (*Award* at 6-7), are statutory interpretations which will be reviewed *de novo*.

IV. DISCUSSION

1. Withdrawal by Crown Cork before September 26, 1980

Under the MPPAA, "a complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (1982). The first test covers the employer's contribution of funds for its employees to the multiemployer fund. The second test, applicable here, defines withdrawal based upon the status of the employer's covered operations. Section 1383 (e) defines the date of complete withdrawal as "the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. § 1383(e) (1982).

Arbitrator Duff, after reviewing the stipulated facts and other documents submitted by the parties, concluded that "the [f]acts on record do not warrant any conclusion that covered operations at the Company's St. Louis Plant had ceased before September 26, 1980 within the meaning of § 588(a)(1)." *Award* at 5. The Arbitrator also concluded that "[o]n September 26, 1980 operations at the Company's St. Louis plant had most emphatically not ceased, despite the obvious fact that they were indeed winding down." *Id.* at 6. As of September 25, 1980, forty-four employees—members of production and maintenance unit of Local 688—still remained at the St. Louis plant. Of the clerical staff, four out of twelve from Local 688 remained. *See*, Award at 2-3. The production and maintenance unit employees were performing production line work, albeit "finish-up work," which amounted to 265 production line hours in October, 1980. This is beyond the scope of mere clean-up or incidental work to a plant dismantling; the production line hours were part of "covered operations." Indeed, the continued production work

gave rise to contributions to the plan.[8] The preponderance of these facts bolsters the Arbitrator's conclusion that covered operations had not ceased before September 26, 1980.

2. Crown Cork's Binding Agreement to Withdraw

DEFRA sets forth another special rule which exempts an employer from withdrawal liability. If the employer has a "binding agreement to withdraw" in place by September 26, 1980, then complete withdrawal may occur before December 31, 1980. Pub. L. No. 98-369, § 558 (a) & (d), 98 Stat. 494 (1984), *reprinted at* 29 U.S.C. § 1381 Note (1984). Thus, a two-step inquiry is necessary: 1) Did Crown Cork have a binding agreement to withdraw; and if so, 2) Did a complete withdrawal occur before the end of 1980.

In his decision, Arbitrator Duff reasons, "the statute [DEFRA] contains neither a definition of a 'binding agreement to withdraw' nor an explanation of the phrase." *Award* at 6. Citing no authority, he then interprets the language of "binding agreement to withdraw" as:

> [An] *agreement of sale* that would lead to a withdrawal from a multiemployer pension plan. This Arbitrator is not authorized to expand exceptions to withdrawal liability that Congress did not fashion. The existence of an enforceable agreement on or before September 26, 1980 committing Crown to sell its assets would relieve Crown of its withdrawal liability, but the mere fact that de facto Crown was committed to its plan to close the St. Louis Plant is not enough to satisfy *the statute's literal requirements.*

Award at 6-7 (emphasis added). Reviewed *de novo*, the Arbitrator's legal interpretation equating "binding agree-

[8] "Crown continued to make *de minimis* contributions to the Fund until November, 1981 . . . ." (Mot. to Vacate at 19).

ment to withdraw from a multiemployer plan" with "agreement of sale" is unpersuasive and contrary to the spirit in which DEFRA was enacted. A literal reading of "binding agreement to withdraw from a multiemployer plan" creates an ambiguity. An employer cannot "agree" to withdraw from a multiemployer plan. Rather, the employer may take definitive action, such as discontinuing operations, which results in withdrawal. Therefore, a more expansive reading of the language is required. "In 1984, Congress concluded that MPPAA's retroactive effective date was unduly harsh towards employers who withdrew from multiemployer plans after April 29 but before September 26, 1980 and unnecessary to preserve the financial integrity of multiemployer plans." *Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760, 765 (6th Cir. 1987) (citing Staff of Joint Comm. on Taxation, 98th Cong., 2d Sess. General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, at 893 (Joint Comm. Print 1985)). To remedy this, DEFRA repealed the retroactive provisions of MPPAA. Section 558 of DEFRA mandates September 26, 1980 as the new effective date of complete or partial withdrawal in order to avoid withdrawal liability. Crown Cork argues effectively that it falls within the ambit of Congress' goal to alleviate harsh consequences for such employers.

Crown Cork announced on July 28, 1980 that the St. Louis plant would close. Employees and their union representatives were notified, massive lay-offs and transfers occurred, and finish-up work and liquidation began. Moreover, Abrams and DeGrande met on August 13, 1980 and several times thereafter to negotiate certain aspects of the closure, including severance pay, vacation pay, and related matters.[9] As Crown Cork was obligated

[9] Crown Cork's announcement of the plant closing carried with it legally binding obligations under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA") and under state common law,

to bargain with Local 688 over the ramifications of the Plant closing, the actual steps toward final closing were not executed unilaterally. The Fund itself recognizes that the key to a pre-DEFRA commitment which would lead to withdrawal is "the irrevocability of the employer's commitment. Otherwise the employer could simply alter its conduct and avoid a withdrawal by continuing to contribute." (Central States' Br. in Supp. of Summ. J. at 30). The true purpose, then, behind § 558 is to allow exemptions from liability to those employers who in good faith effectively and irrevocably were committed to withdrawing from a multiemployer plan before September 26, 1980. Crown Cork's determination to close the St. Louis Plant in July was a business decision based upon economic realities. The effects of closing were finalized through bargaining with the unions. Clearly no bad faith attempts by Crown Cork to alter its course of conduct to avoid withdrawal liability were at issue. The logical and practical consequences of Crown Cork's actions resulted in a withdrawal.

To comport with his legal interpretation of "binding agreement to withdraw," the Arbitrator also found that Crown Cork's agreement with Turley Martin, a real estate broker, was not a "vehicle to force Crown to sell its plant if it chose not to." *Award* at 7. However, a more equitable and practical view of the statutory language and Congress' intent in enacting DEFRA negates the Arbitrator's narrow interpretation that only an irrevocable contract of sale complies with the statute. In

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i.e. misrepresentation, breach of implied contract, estoppel. Pursuant to the NLRA, an employer is required to bargain in good faith regarding the cessation of operations. *See, e.g., First Nat. Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 n. 15, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981); *NLRB v. Nat. Car Rental System, Inc.*, 672 F.2d 1182, 1188 (3d Cir. 1982). In addition, Crown Cork was legally obligated to ensure the honesty of its claims to the unions. *See, NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152, 100 L. Ed. 1027, 76 S. Ct. 753 (1956); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989).

addition to the above commitments by Crown Cork to withdraw, the company entered into a listing contract with Turley Martin on September 23, 1980. (Mot. to Vacate, App. 1, Ex. F). The contract bound Crown Cork to sell the Plant if the broker produced a "ready, willing, and able" buyer. *Id.* If Crown Cork did not complete the sale, the broker, nevertheless would be entitled to a fee of $90,000. Given the substantial penalty provision in the agreement, Crown Cork had a binding agreement. Also of significance is the economic reality that factory facilities are not readily sold. One court has pointed out that:

> Most commercial transactions are not simple, one-step transfers but multi-step arrangements beginning with an agreement and ending with a final closing, often months later. Section (d) [of § 558 DEFRA] is a recognition of this fact and represents a policy choice by Congress to treat alike both employers with binding agreements to withdraw before the new effective date and who do withdraw within the few months provided, and employers who in fact withdrew before the effective date, for purposes of calculating liability under MPPAA.

Central States v. 888 Corp., 813 F.2d at 765 (footnote omitted).

Therefore, this court finds that the contract between Crown Cork and Turley Martin falls within the language and statutory purpose behind "binding agreement to withdraw."

3. Complete Withdrawal by December 31, 1980.

Since Crown Cork's activities constituted a binding agreement to withdraw, the next inquiry is whether a complete withdrawal occurred before December 31, 1980. Under the statute a complete withdrawal occurs when an employer "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a)(2). The date of

a complete withdrawal is defined as "the date of . . . the cessation of covered operations." 29 U.S.C. § 1383(e). Arbitrator Duff did not reach this inquiry, as he found no binding agreement to withdraw. *See, Award.*

Courts have held that an employer is not involved in "covered operations" when it performs "work activities" that are "incidental to cessation of normal business activities." *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 607 F. Supp. 570, 572, 573 (S.D.N.Y. 1985). *See also, Speckman v. Barford Chevrolet Co.*, 535 F. Supp. 488, 491 (E.D. Mo. 1982) ("An employer 'ceases covered operations' if it ceases the business activity that gave rise to contributions to the plan."). In the pre-DEFRA case of *F.H. Cobb v. New York State Teamsters Conference Pension & Retirement Fund*, 584 F. Supp. 1181 (N.D.N.Y. 1984), the court found that Cobb ended its covered operations when it ceased all of its regular business operations, sold its assets and terminated all of its employees but for a few retained to perform "tasks incident to the closure of operations." *Id.* at 1184. Though Cobb retained between 5% and 9% of the pre-closure workforce for two months to perform tasks related to the closure, the court held that a complete cessation of covered operations with the meaning of the MPPAA had occurred. *Id.* at 1185.

In the more recent case of *Connors v. Economy Bldg. Systems, Inc.*, 651 F. Supp. 849 (D.D.C. 1986), the court followed a practical approach in construing "cessation of operations." The employer, Economy, contracted to build mine service facilities for a coal company. The project began in 1978 and was completed in late 1980. During the height of construction, Economy employed as many as fifteen workers; by August 6, 1980, the last five employees were laid off. In October 1980, Economy rehired two employees to do a general clean-up and to install door hardware. *Id.* at 850. In that month, employees performed sixty-six hours of work for which the

employer paid $49.50 into the fund. Disputing the Pension Plan's assessment of $62,389.22 in withdrawal liability, Economy argued that it completely withdrew from the Plan before September 26, 1980. The court found that the sixty-six hours of work performed was "incidental to the real business of Economy and not of the sort that will defeat a good faith claim that 'covered' operations had ceased." *Id.* at 854 (footnote omitted). Moreover, the court held that to find for the Pension Plan would "offend the concept of proportionality" and to hold the employer liable in the amount of $62,389.22 for a minimal amount of clean-up work performed two months after the company had ceased its basic operations would be "grossly inequitable." *Id.*

The Fund, however, relies on *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208 (7th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989). There the court found that "all"—100 percent—of covered operations must cease permanently before finding that an employer has completely withdrawn from a multiemployer plan. Thus, *any* bargaining unit work being performed, whether clean-up work or *de minimus* finish-up work, precludes complete withdrawal. *Id.* at 213.

Other courts have rejected a literal construction of the language in § 1383(a)(2). *See, Combs*, 691 F. Supp. at 430-31; *Connors*, 651 F. Supp. at 853-54; *ILGWU National Retirement Fund v. Weatherall Fashions, Inc.*, No. 84 Civ. 9772, slip op., 1986 WL 2757 (S.D.N.Y. 1986); *Cobb*, 584 F. Supp. at 1183; *Speckman*, 535 F. Supp. at 491. I am persuaded that the less restrictive interpretation of the applicable statutes by these cases is more in keeping with the intent of Congress.

The undisputed facts show that Crown Cork had terminated or transferred most of its employees before the end of September, and the employees who remained were involved in "finish-up" work. Only nine of the twenty-

nine management employees, under 30% of the production and maintenance employees and one third of the clerical staff stayed on to wrap things up. It was apparent that the Plant was incapable of engaging in anything resembling normal operations. Some *de minimus* work continued until October 10, 1980, in order to dispose of partially completed cans which otherwise would have been scrapped. The production line-hours in October 1980 totalled 265 hours which was only 5% of a typical pre-closure monthly total of 4419 line hours. Thereafter, production had ceased and the only employees who remained in the Plant after December 31, 1980 were three production and maintenance workers, one clerical worker and four management employees performing only tasks incidental to plant closing.

For all practical purposes, Crown Cork had suspended its operations by December 31, 1980, thus effecting a complete withdrawal and exempting it from withdrawal liability.

V. CONCLUSION

For the aforementioned reasons, the arbitration award will be VACATED.[10] An appropriate order follows.

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[10] There is no need to reach the merits of Crown Cork's Equal Protection claim.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 84-5737

CROWN CORK AND SEAL COMPANY, INC.,
Plaintiff and
Counter-Defendant,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, *et al.*,
Defendants and
Counter-Plaintiffs.

Civil Action No. 91-4423

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, *et al.*,
Plaintiff,

vs.

CROWN CORK AND SEAL, INC.,
Defendant.

Clerk of the United States Court of Appeals
for the Third Circuit

ORDER

[Filed Mar. 31, 1992]

AND NOW, this 30th day of March 1992, upon consideration of Crown Cork and Seal, Inc.'s Motion to Vacate the Arbitration Award and defendant's opposition thereto, it is

ORDERED

that plaintiff's motion is GRANTED. The arbitration award is VACATED. It is further

ORDERED

that defendant's Motion for Summary Judgment is DENIED.

BY THE COURT:

/s/ Joseph L. McGlynn, Jr.
JOSEPH L. MCGLYNN, JR.
J.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION MULTIEMPLOYER PENSION PLAN ARBITRATION RULES

Case Number: 51 621 0022 89 V

IN THE MATTER OF THE ARBITRATION BETWEEN:

CROWN CORK & SEAL COMPANY, INC.

and

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

AWARD OF ARBITRATOR(S)

I, (WE) THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated ——— and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

AWARD

Crown Cork's request to be found to be exempt from withdrawal liability based upon § 558 of DEFRA lacks merit and is denied.

The undersigned retains jurisdiction to finally determine any amounts owing.

FINAL AWARD

The undersigned finds that Crown owed $2,072,247.08 in principal and interest as of February 20, 1991 for withdrawal liability.

Crown does not owe the Fund for any Attorney's fees.

June 7, 1991

Pittsburgh, Pennsylvania

January 15, 1991

/s/ James C. Duff
JAMES C. DUFF
Arbitrator

ARBITRATION OPINION AND AWARD

JAMES C. DUFF
ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN
CROWN CORK & SEAL COMPANY, INC.

AND

CENTRAL STATES SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND

SUBJECT: WITHDRAWAL LIABILITY

CASE ADMINISTERED BY
AMERICAN ARBITRATION ASSOCIATION
CHICAGO REGIONAL OFFICE

APPEARANCES BY BRIEF

For the Company

Steven B. Feirson
Alan D. Berkowitz
Jerome M. Marcus
DECHERT PRICE & RHOADS
Attorneys for the Company

For the Fund

Thomas C. Nyhan
Terence G. Craig
Neal S. Deodhar
Attorneys for the Pension Fund

APPOINTMENT

The undersigned Arbitrator was selected by representatives of Cork Crown & Seal Company, Inc. and of Central States Southwest and Southwest Areas Pension Fund, from a panel furnished by the American Arbitration Association, to hear and decide a pension dispute pending between the Parties. The matter was ultimately submitted for an arbitration ruling on the basis of stipulations, written arguments and associated documents. After reviewing the complete evidentiary record thus compiled, the undersigned now enters the following disposition of this controversy.

BACKGROUND FACTS

The stipulation of facts contained the following:

> 1. Plaintiff Crown Cork & Seal Company, Inc. ("Crown") is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. Crown is engaged in the business, among other things, of manufacturing and selling cans, closures, and machinery. As part of that business, Crown previously operated a plant in St. Louis, Missouri ("the St. Louis Plant").
>
> 2. Defendant Central States, Southeast and Southwest Areas Pension Fund ("the Fund") is a multiemployer pension plan within the meaning of §§ 3(2), (35) and (37)(A) of ERISA, 29 U.S.C. § 1002(2), (35), and (37)(A), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), §§ 207(a) and 302(a).
>
> 3. Employees at the St. Louis Plant were represented by four unions. Production and maintenance employees, as well as some clerical employees, were represented by Local 688 of the International Brotherhood of Teamsters ("Local 688") in separate bargaining units. [148] Employees represented by

Local 688 were employed in job classifications for production and in job classifications for maintenance in March, 1980.

4. Under Crown's collective bargaining agreement with Local 688, Crown was obligated to make pension contributions to the Fund. . . .

5. In early 1980, Crown Cork's management began to consider seriously the possibility of closing the St. Louis Plant primarily due to the out-dated capability of the Plant compared to more modern facilities. In or about July, 1980, Harold Abrams, Director of Industrial Relations, was informed by Crown management that a final decision had been made to close the St. Louis Plant.

6. On July 28, 1980, Abrams sent a letter to each of the four unions that represented employees at the St. Louis Plant, officially informing them of the Company's decision to close the St. Louis Plant. . . .

7. By letter dated July 31, 1980, from Ken DeGrande to Harold Abrams, DeGrande acknowledged receipt of the July 28, letter. . . .

8. Abrams first met with DeGrande on August 13, 1980, and on occasions thereafter, to negotiate. The negotiations with Local 688 focused exclusively on the "effects" of closing, *i.e.*, severance pay, vacation pay, and related pension contributions.

9. Local 688 (or any other Union representing employees of the St. Louis Plant) did not at any time file a grievance, lawsuit, or any other claim challenging Crown's decision or right to close the St. Louis Plant.

10. Local 688 filed an unfair labor practice charge against Crown with the NLRB on June 21, 1982, regarding Crown's failure to bargain in good faith over the "effects" of the closing. The transcript of

proceedings before the NLRB is attached hereto as Exhibit I. The NLRB's decision was reviewed by the U.S. Court of Appeals for the Eighth Circuit in a decision reported at 756 F.2d 659 (8th Cir. 1985). . . .

11. As of March 1980, there were 29 management employees at the Plant. As a result of layoffs, terminations, and transfers, that number was reduced to 9 management employees (31% of the earlier number) at the Plant as of September 25, 1980. . . .

12. As of March 1980, there were 148 employees at the St. Louis Plant who were members of the production and maintenance unit of Local 688. As a result of the layoffs and terminations, that number was reduced to 44 employees (30% of the earlier number) as of September 25, 1980. . . . .

13. As of March 1980, there were 12 employees at the St. Louis Plant who were members of the clerical unit of Local 688. As a result of layoffs and terminations, that number was reduced to 4 employees (33% of the earlier number as of September 25, 1980. . . .

14. On September 16, 1980, Donald Kirkpatrick, Crown's Director of Production Control, issued an internal mailgram to all of Crown's Vice-Presidents for Sales, all Plant Managers, all Production Control Managers, and all Sales Office Managers, as well as other senior management personnel at Crown, concerning the St. Louis Plant (known within the Company as Plant 12). . . .

15. On September 23, 1980, Crown put the St. Louis Plant up for sale by entering into a listing agreement with Turley Martin Company, a real estate broker, for the sale of the St. Louis Plant. . . . The Plant was later sold by an agreement executed as of June 3, 1982. . . .

16. Production activities ceased at the St. Louis Plant by October 10, 1980. After October 10, 1980 the only work performed at the St. Louis Plant consisted of dismantling, maintenance, clean-up, and disposal of equipment and property.

17. Production records indicate that total production line hours were 4,419 in April, 1980; 265 hours in October, 1980; and zero in November, 1980 and thereafter. The 265 production line hours in October, 1980 were performed by the following departments: lithography—76 line hours; can assembly—122 line hours; and packing—67 line hours. No line hours were performed in October, 1980 by the coil sheeting and punch press departments. These departments perform the initial production steps in the process of producing cans: the coil sheeting department cuts steel coils into sheets and the punch press department punches out the shapes for the can tops and bottoms. Thereafter, the lithography department imprints the cans with words and design and can assembly puts the component pieces of the cans together.

18. On October 15, 1980, the Plant Manager, Paul A. Westoff, sent a letter to Ken DeGrande concerning the St. Louis Plant. . . .

19. On October 22, 1980 Crown's Insurance Administrator, Joseph W. Albrecht, sent a letter to one of Crown's insurance carriers, Insurance Company of North America. . . .

20. Additional layoffs and terminations followed, so that, by December 31, 1980, only [3] members of Local 688's production and maintenance unit and only [1] member of Local 688's clerical unit were still employed at the St. Louis Plant. As shown on Exhibit D-2 the last production and maintenance unit employee was laid off on November 6, 1981.

21. Crown submitted employee work history reports to the Fund for employees covered by the Local 688 Agreement for the months of October, 1980, through November, 1981, for work performed during that period. These reports were used to calculate the contribution obligation of Crown Cork for this period. . . .

22. On November 2, 1983, Crown received from the Pension Fund a notice and demand for payment of withdrawal liability in the amount of $31,802.75 monthly beginning January 1, 1984, or, alternatively as a lump sum amount of $1,319,859.30. . . .

23. On December 20, 1983 the Pension Fund issued a past due notice which was received by Crown. . . .

24. By letter dated December 30, 1983, Crown requested review of the withdrawal liability determination of the Pension Fund. . . .

25. The Pension Fund responded to the review request on March 23, 1984. . . .

26. Crown Cork commenced interim payments of $31,802.75 per month in June, 1990.

The Parties respective Briefs and Reply Briefs are voluminous and complex in this case. No useful purpose would be served by attempting to reiterate them in detail here, but they are incorporated in full into the record here by reference.

CONTENTIONS OF THE PARTIES

The Company insists that it had ceased covered operations by September 26, 1980 and is therefore not subject to withdrawal liability under the Multi-Employer Pension Plan Amendment Act ("MPPAA"), 29 U.S.C. §§ 1381-1461. In any event, it contends that it is not subject to withdrawal liability because it was allegedly

committed as of September 26, 1980 to withdrawal from the Plan and in fact withdrew by year end.

The Fund maintains that Crown Cork did not completely withdraw from the Pension Fund until after the end of 1980. Alternatively, it takes the position that the Company did not have a binding agreement to withdraw within the meaning of § 558 of the Deficit Reduction Act of 1984 on September 26, 1980.

DISCUSSION AND FINDINGS

After a protracted review of all of the evidence and repeated scrutiny of all of the arguments advanced by Counsel for both Parties in this case, the undersigned finds that § 558 of the Deficit Reduction Act of 1984 ("DEFRA") does not insulate the Company from the withdrawal liability assessed by the Fund. The facts on record do not warrant any conclusion that covered operations at the Company's St. Louis Plant had ceased before September 26, 1980 within the meaning of § 588(a)(1). In addition, there is no evidence capable of sustaining a finding that as of that date Crown had a binding agreement to withdraw from the Plan within the meaning of § 558(d).

Nothing on record persuades the undersigned that he should overlook the literal meaning of the statutory language as applied to the facts prevailing on September 26, 1980. An interpretation of the language here in focus equating a cessation of "most" covered operations, a cessation of "normal operations," a cessation of "regular business operations," or a cessation "when business activity substantially ceases" with a complete withdrawal departs from the language chosen by Congress. The fact that Congress left the language it selected unqualified must be presumed to be meaningful.

On September 26, 1980 covered operations at the Company's St. Louis Plant had most emphatically not ceased, despite the obvious fact that they were indeed winding

down. The undersigned is not at liberty to adopt a "practical approach" so as to achieve under the guise of interpretation a result that is at odds with what the statutory language generates through its straightforward application to the facts. The vague standards the Company argues in favor of would confer far greater latitude and discretion on arbitrators than the prescribed standard on its face suggests that Congress ever intended them to have with respect to deciding withdrawal disputes.

As the Company points out, DEFRA of course also exempts from liability those employers who had a "binding agreement to withdraw" in place by September 26, 1980 if the employer in fact withdrew by year end. It goes on to argue that this really translates into just a requirement of a definite commitment to withdraw from the Fund before that same date. Unfortunately, the statute contains neither a definition of a "binding agreement to withdraw" nor an explanation of the phrase.

So far as the undersigned can ascertain, this language refers to an agreement of sale that would lead to withdrawal from a multiemployer pension plan. This Arbitrator is not authorized to expand exceptions to withdrawal liability that Congress did not fashion. The existence of an enforceable agreement on or before September 26, 1980 committing Crown to sell its assets would relieve Crown of its withdrawal liability, but the mere fact that de facto Crown was committed to its plan to close the St. Louis Plant is not enough to satisfy the statute's literal requirements.

The listing agreement that Crown entered with a real estate broker had none of the indicia of a legally enforceable sales agreement. That agreement was a promise to pay a commission or a penalty under certain contingencies. It could not be used as a vehicle to force Crown to sell its plant if it chose not to.

The undersigned is likewise not persuaded that Local 688 did anything that gave rise to a "binding agreement"

or that the Company was legally bound to go forward with its announced intentions of closing the plant in some way that satisfied DEFRA.

It must be concluded that the escape provisions of DEFRA's § 558 do not purport to be as flexible as the Company believes they were intended to be. Against this backdrop, the undersigned is of the opinion that it is not an arbitrator's proper province to go on a frolic into either his own or the Company's view of Congress' supposed intent in the specific contexts at hand.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1345

CROWN CORK & SEAL COMPANY, INC.

vs.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a Federal multiemployer employee pension benefit plan; LORAN W. ROBBINS; MARION M. WINSTEAD; ROBERT C. SANSONE, ROBERT J. BAKER; HOWARD MCDOUGALL; ARTHUR H. BUNTE; R. JERRY COOK and R. V. PULLIAM, its present trustees in their fiduciary capacity(ies) (D.C. Civil No. 84-05737)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust; MARION M. WINSTEAD; ROBERT C. SANSONE; ROBERT J. BAKER; HOWARD MCDOUGALL; ARTHUR H. BUNTE, JR.; R. JERRY COOK; R. V. PULLIAM, SR.; HAROLD D. LEU, its present trustees

vs.

CROWN CORK & SEAL COMPANY, INC.
(D.C. Civil No. 91-04423)

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and its trustees, including MARION M. WINSTEAD, ROBERT C. SANSONE, ROBERT J. BAKER, HOWARD MCDOUGALL, ARTHUR H. BUNTE, JR., R. JERRY COOK, R. V. PULLIAM, SR. and HAROLD D. LEU,

Appellants

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS and GARTH,* *Circuit Judges.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Greenberg, Nygaard, Alito and Roth would have granted rehearing.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

Dated: January 19, 1993

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* Senior Circuit Judge Garth voted only as to panel rehearing.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81-7068
No. 81-6036

JOSEPH SOLAR, SIDNEY FISHER, VINCENT REGAN, JAMES HORNE, MICHAEL MANGOT, as Trustees of District No. 15 Machinists' Pension Fund,
Plaintiff-Appellants, Cross-Appellees,

v.

PENSION BENEFIT GUARANTY CORPORATION and KOLLSMAN INSTRUMENT COMPANY,
Defendants,

KOLLSMAN INSTRUMENT COMPANY,
Defendant-Appellee,

PENSION BENEFIT GUARANTY CORPORATION,
Defendant-Appellee, Cross-Appellant.

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT
PENSION BENEFIT GUARANTY CORPORATION

STATEMENT OF THE ISSUE

Whether, under 29 U.S.C. § 1363, a "withdrawal" from a pension plan to which more than one employer contributes occurs only when there is a 100% cessation of participation by a contributing employer.

PRELIMINARY STATEMENT

The judgment below was rendered by United States District Judge Milton Pollack of the Southern District of New York. The opinion, reproduced in the Joint Appendix (hereinafter, "J.A.") at pp. 275-295, is reported at 504 F.Supp. 1116.

STATEMENT OF THE CASE

These consolidated appeals involve a dispute between the Trustees of a pension fund known as the District No. 15 Machinists Pension Fund (the "Fund"), an employer which has contributed to the Fund, the Kollsman Instrument Company ("Kollsman"), and a United States Government corporation, the Pension Benefit Guaranty Corporation (the "PBGC"). The Trustees and the PBGC contend that Kollsman withdrew from the Fund within the meaning of Sectin 4063 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1363 (1976). Section 4063 provides for certain remedies to protect pension plans from the "withdrawal" of a substantial employer. The remedies may entail liability of the withdrawing employer. Kollsman contends that it did not withdraw from the Fund.

The Fund is maintained jointly by the District No. 15 of the International Association of Machinists and Aerospace Workers, AFL-CIO ("District No. 15") and by numerous employers who have agreed with District No. 15 to contribute to the Fund (J.A. 28-29). The Trustees comprise the joint labor-management board which operates the Fund (J.A. 29).

Kollsman is a division of Sun Chemical Corporation (J.A. 29). It manufactures aircraft instruments (J.A. 31-32).

Prior to 1968, Kollsman maintained a pension plan for certain Kollsman employees (the "Kollsman Plan"). In July 1968, the Fund and Kollsman agreed to merge the Kollsman Plan into the Fund. (J.A. 83.) The Fund agreed to assume all of the pension obligations of the Kollsman Plan, and Kollsman agreed to transfer all the assets of the Kollsman Plan to the Fund (J.A. 80-81, 90-91).

Pension benefits to Kollsman employees under the Fund were greater than those provided by the Kollsman Plan (J.A. 83). Kollsman employees obtained credit for past service to Kollsman, and more liberal or equal vesting, eligibility, and benefit levels (J.A. 85-89). This added an immediate and substantial unfunded liability to the Fund.

In July 1968, immediately after the plans merged, Kollsman contributed to the Fund with respect to 1,716 of its employees (J.A. 104). Kollsman then operated two major manufacturing plants in the New York area, the Elmhurst plant and the Syosset plant (J.A. 30).

In the early 1970's Kollsman decided to cease all major manufacturing operations in the New York area and to open a major manufacturing plant in New Hampshire (J.A. 29, 30, 31-32). The jurisdiction of District No. 15, and hence the Fund, does not extend to New Hampshire (J.A. 30). Kollsman also decided to open a small repair facility in Plainview, New York, within the jurisdiction of District No. 15 (J.A. 32).

Kollsman closed the Elmhurst Plant in the early 1970's (J.A. 30). On December 31, 1976, Kollsman completed its shutdown of the Syosset plant by selling the plant and laying off its remaining Syosset employees (J.A. 32).

Concurrently with the shutdown, Kollsman opened the small Plainview facility (J.A. 32). In December of 1976, Kollsman contributed to the Fund with respect to only 18 employees (J.A. 104). In 1977, Kollsman made monthly contributions to the Fund with respect to between 12 and 17 Plainview employees (J.A. 104).

Kollsman's contributions to the Fund were reduced from a high of $709,848.00 for the Fund year ending on July 31, 1973, to $53,899.00 for the Fund year ending on December 31, 1976 (J.A. 31). For the Fund year which ended December 31, 1977, the first Fund year which fully reflected both Kollsman plant closings, Kollsman's contributions were $15,679.00 (J.A. 31).

The Fund is responsible for paying pension benefits to former employees of Kollsman even though Kollsman has drastically reduced contributions to the Fund (J.A. 44, 74). The continuing obligation to fund these benefits falls almost entirely upon the other employers which contribute to the Fund (J.A. 31, 74, 126-130), absent the application of Section 4063 in this case. According to the Fund's actuarial reports, as of December 31, 1976, the Fund had approximately $25 million in assets (J.A. 125, 128). The Fund was liable for at least $66 million in vested benefits *in excess of* those assets (J.A. 129-130). Of this $66 million unfunded liability, the reports show that at least $9.9 million was attributable to Kollsman (J.A. 130).

The PBGC is a United States Government corporation established to administer the Plan Termination Insurance program created by Title IV of ERISA, 29 U.S.C. § 1301 *et seq.* The board of directors of the PBGC consists of the Secretary of Labor, the Secretary of the Treasury, and the Secretary of Commerce. 29 U.S.C. § 1302(a), (d).

By letter dated January 15, 1976, the Trustees notified the PBGC that Kollsman had reduced contributions to

the Fund, and requested the PBGC to "partition" the Fund, pursuant to 29 U.S.C. § 1363(d) (J.A. 106-107), a remedy provided in some cases for employer withdrawals. At that time, Kollsman still made contributions to the Fund with respect to approximately 260 employees (J.A. 104). The PBGC decided that Kollsman had not withdrawn from the Fund (J.A. 110). In December 1976, the Trustees asked the PBGC to reconsider its decision, and the parties submitted additional information and documents (J.A. 33). By letter dated August 11, 1977, eight months after the sale of the Syosett plant, the Trustees were notified that the PBGC again concluded that Kollsman had not withdrawn from the Fund (J.A. 147-148). At that time, Kollsman contributed to the Fund with respect to 13 Plainview facility employees (J.A. 104). The PBGC's determinations were based upon the position that less than a total cessation of participation does not constitute a withdrawal (J.A. 147-148).

On November 23, 1977, the Trustee filed their Complaint in the United States District Court for the Southern District of New York. It requests a declaratory judgment that Kollsman has "withdrawn" from the Fund ("Count 1") and an injunction requiring the PBGC to partition the Fund pursuant to 29 U.S.C. § 1363(d) ("Count 2") (J.A. 15-16). The District Court directed that Count 2 be held in abeyance, and requested the parties to stipulate to facts with respect to Count 1 (J.A. 28).

On April 30, 1979, the parties filed a joint Stipulation of Facts and Joint Exhibits (J.A. 28-148), and defendants PBGC and Kollsman each filed a Motion for Summary Judgment on Count 1, both contending that Kollsman had not withdrawn. On June 5, 1979, the District Court remanded the case to the PBGC to determine whether Kollsman attempted to evade Section 4063 by establishing the Plainview facility (J.A. 149-150).

When the case was remanded to the PBGC, intensive study of the treatment of multiemployer pension plans

under Title IV of the ERISA was underway. The PBGC reevaluated its prior interpretation of Section 4063, and concluded that less than a total cessation of participation may constitute a "withdrawal." On March 27, 1980, the PBGC notified the Court and the parties of the PBGC's corrected interpretation of Section 4063 and that Kollsman had withdrawn from the Fund. (J.A. 151-169.) The District Judge redirected the agency to determine Kollsman's motives in establishing the Plainview facility. On September 25, 1980, the PBGC concluded that Kollsman opened the Plainview facility for ordinary business reasons and that the avoidance of Section 4063 was not a factor in Kollsman's decision. (J.A. 180.)

On December 2, 1980, the PBGC filed a Motion for Summary Judgment, reflecting its corrected interpretation of Section 4063, contending that Kollsman did withdraw from the Fund (J.A. 188-197). On January 6, 1981, the District Court granted Kollsman's Motion for Summary Judgment that it did not "withdraw," and denied the PBGC's Motion for Summary Judgment (J.A. 295). The Trustees and the PBGC have appealed, and the appeals have been consolidated.

* * * *

APPENDIX F

BRIEF FOR AMICUS CURIAE PENSION BENEFIT GUARANTY CORPORATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1086

CROWN CORK AND SEAL COMPANY, INC.,
Plaintiff-Appellee,
v.
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

CAROL CONNOR FLOWE
Acting General Counsel
PETER H. GOULD
Assistant General Counsel
ISRAEL GOLDOWITZ
Senior Counsel
JOHN FOSTER
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006-1806
(202) 778-8823

* * * *

II.

SECTION 558 OF DEFRA DOES NOT APPLY TO CROWN CORK

A. Crown Cork Competely Withdrew From The Plan When It Ceased All Covered Operations Under The Plan.

A complete withdrawal from a multiemployer plan occurs when an employer "permanently ceases *all* covered operations under the plan." 29 U.S.C. § 1383(a)(2) (emphasis added). The unambiguous wording of the language defining a complete withdrawal contrasts starkly with the wording of related provisions of ERISA, such as provisions that (1) provide special withdrawal rules for employers in certain plans if "substantially all" of the employer's covered employees work in a given industry, 29 U.S.C. §§ 1383(b)(1)(A), (c)(1)(A); (2) limit the amount of certain employers' withdrawal liability in the case of a bona fide sale of "all or substantially all" of their assets, 29 U.S.C. § 1405(a)(1); (3) impose special bonding requirements on an employer seeking to avert a withdrawal if "all, or substantially all" of the employer's assets are distributed, 29 U.S.C. § 1384(a)(3); and (4) limit the application of certain relief provisions if "substantially all" employers have withdrawn from the plan within a certain time, 29 U.S.C. § 1389. Congress clearly knew how to distinguish between all and nearly all, and it chose the former in defining a "complete" withdrawal.

Congress even specifically distinguished a "complete withdrawal," where there is a cessation of all covered operations, from a "partial withdrawal," where there is a significant reduction in an employer's obligation to contribute to the plan or in its covered operations, but less than 100 percent of covered operations cease. *Compare* 29 U.S.C. § 1383(a)(2) *with* 29 U.S.C. § 1385. Congress defined a partial withdrawal in terms of either a reduction in contribution base units (*e.g.*, hours worked)

of at least 70 percent over a three-year period, or a partial cessation of the obligation to contribute. 29 U.S.C. § 1385(a), (b). The 70 percent decline rule plainly evidences Congressional intent to deal with a decline in covered operations of less than 100 percent as a "partial withdrawal" under 29 U.S.C. § 1385(a), rather than as a "complete withdrawal" under 29 U.S.C. § 1383 (a)(2).

Congress gave thorough consideration to the subject of partial withdrawals. *See* 29 U.S.C. §§ 1385(c) (allowing a retail food industry plan to use a different percentage of decline in contributions), 1338(d)(1) (varying the partial withdrawal liability definition for plans in the construction industry), and 1388(d)(2) (providing for no partial withdrawals in entertainment industry plans, unless provided for by the PBGC). And, Congress provided for the abatement of partial withdrawal liability if an employer's contributions should increase significantly after the employer has been assessed liability for a partial withdrawal. *See* 29 U.S.C. § 1388. Thus, Congress considered a range of issues relating to partial withdrawals and adopted provisions governing partial withdrawal liability that were "comprehensive and reticulated." *See Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). Congress did not, however, provide anywhere in ERISA that a cessation of "most" covered operations in a single plan year (as occurred here) constitutes a complete—or even a partial—withdrawal.

The district court opinion below ignores the statute and reaches the conclusion that a complete withdrawal occurred in 1980. Yet, it is undisputed that bargaining unit members worked at the St. Louis plant until November 1981 and that, throughout that time period, a collective bargaining agreement requiring contributions to the Fund for the work of bargaining unit members was in effect. (App. 139.) The district court's rationale for contravening the express wording of MPPAA is that

"normal" business operations had ceased. The district court, however, is unclear whether "normal" operations is defined in terms of type of work ("employees that remained were involved in 'finishing-up' work"), number of workers ("under 30% of the production and maintenance employees and one third of the clerical staff"), or hours of work ("line-hours in October 1980 [were] 5% of a typical pre-closure monthly total"). (App. 32-33.)

These distinctions are not found in MPPAA. Rather, they are based on cases at the district court level that rely on a single passage from the legislative history of MPPAA, which does not accurately reflect the meaning of the statute:

> The bill would treat an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. Current law does not define a withdrawal. As under current law, a virtually complete cessation of contributions, e.g., a 98-percent reduction, that has the same effect on the plan as a complete cessation of contributions, is a complete withdrawal.

H.R. Rep. No. 96-896, 96th Cong., 2d Sess. 73, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2941 (1980) (hereinafter *Education and Labor Report*).

The passage is from only one of the four jurisdictional committees that considered the Multiemployer Act, the House Education and Labor Committee. The House Committee. The House Committee on Ways and Means issued a separate report on a bill that was then substituted for the bill originating in the Education and Labor Committee. 126 Cong. Rec H4170 (daily ed. May 21, 1980). This report does not mention a "virtually complete cessation of contributions," but rather tracks that bill's definition of a complete withdrawal: "[T]he date of the withdrawal is considered to be the last day of the

plan year in which the employer . . . permanently ceased *all* covered operations." H.R. Rep. 96-869 Part II, 96th Cong., 2d Sess. 16, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 3005 (1980) (emphasis added).

Further, in "Joint Explanation of S.1076: Multiemployer Pension Plan Amendments Act of 1980," *reprinted in* 126 Cong. Rec. 20,195 (1980), the Senate Committee on Finance and the Senate Committee on Labor and Human Resources defined a complete withdrawal without reference to a 98-percent reduction.

The decision below and the cases on which it relies illustrate the "slippery slope" down which arbitrators and courts may begin to slide if the specific quantitative tests prescribed by the statute are not applied. For example, in *F.H. Cobb Co. v. N.Y. State Teamsters Pension Fund*, 584 F. Supp. 1181 (N.D.N.Y. 1984), a court found that a reduction in an employer's workforce of only 91% was sufficient to effect a complete withdrawal within a single year. *Id.* at 1185. The *F.H. Cobb* court paid no heed to the fact that Congress specified that a 70% decline in contribution base units does not effect a withdrawal until it has continued for three years. *See* 29 U.S.C. § 1385(b)(1).

In summary, the district court was wrong in finding that Crown Cork withdrew during the 1980 plan year. The decision of the district court that Crown Cork completely withdrew from the Plan in 1980 while covered operations continued through November, 1981, contravenes the plain meaning of the MPPAA. Rather than rely on a single snippet of legislative history, this Court should instead be guided by the detailed and unambiguous provisions of ERISA, and reverse the district court.

B. Crown Cork Had No Binding Agreement To Withdraw.

After reaching the erroneous conclusion that Crown Cork completely withdrew before December 31, 1980,

the district court addressed the second element of Section 558(d), whether there was a binding agreement to withdraw as of September 26, 1980. It concluded that such an agreement existed, although the only express agreement it could identify was a listing agreement with a real estate broker.[11]

The phrase "binding agreement to withdraw" may refer to a provision in a collective bargaining agreement that the employer will cease contributions to a multiemployer pension plan as of a given date. An example of an agreement of this nature is found in *Lady Baltimore* decision. There, the union and the employer executed a collective bargaining agreement that contained the following provision:

> ARTICLE XVIII—PENSION
>
> Section 7. Effective January 12, 1982 all contributions to the Central States Southeast and Southwest Areas Pension Fund shall cease . . . and all obligations of the Company to said Fund or under any trust agreements shall be terminated. From that date forward regular employees shall be eligible to enter the Company's pension plan pursuant to the terms and provisions of that plan.

Lady Baltimore Foods, Inc., slip op. at 2.

Crown Cork presented no such agreement here. Rather, it relies on the legislative history of Section 558, which adds the notion of a "binding sale agreement to withdraw." Other courts have applied this language and have concluded that it requires an enforceable agree-

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[11] The district court based its decision on what it understood to be the purpose of Section 558(d), even though it conceded that apart from the listing agreement there was no "agreement" in this case. (App. 35.) Courts are not at liberty, however, to carve out exceptions to MPPAA that Congress did not prescribe. *Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking*, 788 F.2d 428, 433 (7th Cir. 1986).

ment to sell assets. *See, e.g., Salem Laundry Company v. New England Teamsters and Trucking Ind. Pens. Fund,* 829 F.2d 278, 279 (1st Cir. 1987) ("[t]he existence of an *enforceable* contract of sale on or before September 26, 1980, would relieve . . . withdrawal liability") (emphasis added); *Debreceni v. The Outlet Company,* 784 F.2d 13 (1st Cir. 1986) (enforceable agreement to sell assets that was executed on September 30, 1980, with a retroactive effective date of September 25, 1980, did not qualify under DEFRA Section 558, because it could not be retroactively binding to the detriment of the pension plan).[12]

The listing agreement here had none of the indicia of a legally enforceable sales agreement.[13] An agreement to sell the plant, like the agreements involved in *Salem* and *The Outlet,* would necessarily have resulted in a permanent cessation of all covered operations by Crown

---

[12] The PBGC notes, in a different context, it has identified the characteristics of certain sales agreements that, without relief granted by the PBGC, would result in a withdrawal. In 1982, the PBGC granted a class exemption to certain bond posting and sales contract requirements of 29 U.S.C. § 1384. 47 Fed. Reg. 34662; *see also The Outlet,* 874 F.2d at 17 (explaining the class exemption). This class exemption entitled a seller and purchaser engaging in a sale of assets transaction before January 1, 1981, to the relief provided by 1384 retroactively, under certain conditions. When this exemption was first promulgated, it applied only to transactions completed before January 1, 1981. However, the PBGC later amended its exemption to include the situation where a legally enforceable contract containing all the terms and conditions of the sale was signed by both parties before January 1, 1981, but actual closing (transfer of title, assumption of the obligation to contribute to the plan, etc.) was deferred to a later date. 48 Fed. Reg. 55359.

[13] Further, under basic hornbook law, this agreement, which was dated September 23, 1980, *was not even binding as a listing agreement until signed by the broker on September 29, 1980.* Until that time, it was a revocable offer by Crown Cork. *See, e.g., The Outlet,* 784 F.2d at 20. And, as pointed out in *The Outlet,* a court should not consider an agreement retroactively binding to the detriment of the third party pension plan. *Id.* at 19-20.

Cork. The listing agreement, however, was merely a promise to pay a real estate broker a commission if Crown Cork received an offer of $1.5 million or more to purchase the St. Louis plant during a given time period. (App. 288.) It in no way obligated Crown Cork to accept an offer to purchase the St. Louis plant that might be tendered during the life of the listing agreement. In short, the listing agreement did not require Crown Cork to actually sell its plant.

* * * *

APPENDIX G

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

SUMMARY PLAN DESCRIPTION AND PENSION PLAN

Effective July 1, 1980

ARTICLE I. DEFINITIONS

Section 1.01: Pension Plan or Plan, as used, herein, shall refer to the employee retirement benefit plan as described herein or as from time to time hereafter amended.

Section 1.02: Trust Agreement, as used herein, shall refer to the Agreement and Declaration of Trust made and entered into the sixteenth day of March, 1955, and as amended from time to time thereafer, by and between Central Conference of Teamsters, Southern Conference of Teamsters, and their affiliated Local Unions, and the Southeastern Area Motor Carriers Labor Relations Association; Southwest Operators Association; Motor Carriers Employers Conference-Central States; Cartage Employers Management Association; Cleveland Draymen Association, Inc.; and Northern Ohio Motor Truck Association, Inc.

Section 1.03: Trust Fund or Pension Fund, as used herein, shall refer to all property of whatever nature which shall be in the Trust created by the Trust Agreement.

Section 1.04: Employer, as used herein, shall mean any Employer who is now, or shall in the future be, bound by a Collective Bargaining Agreement, as hereinafter defined, with the Union, agrees to be bound by the Trust Agreement, satisfies the requirements or participation as established by the Trustees, and is formally accepted for such participation by the Trustees. An Employer shall cease such participation upon determination by the Trustees that said Employer has failed to comply with any of these conditions or any such other conditions or requirements as may be set forth in the Trust Agreement or promulgated pursuant thereto.

Section 1.05: Union, as used herein, shall mean the Central Conference of Teamsters, the Southern Conference of Teamsters, and their affected affiliated local un-

ions, and such other unions as the Trustees may agree upon.

Section 1.06: Employee, as used herein, shall mean:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least 30 days who is employed under the terms and conditions of a Collective Bargaining Agreement, as hereinafter defined, entered into between an Employer, as herein defined, and a Union, as herein defined, and on whose behalf contributions are made or are presently required to be made to the Pension Fund by the Employer; or

(b) All persons employed by the Union, as herein defined, upon being proposed by the Union and after acceptance by the Trustees, as hereinafter defined, and as to such Union personnel the Union shall be considered an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Pension Fund at the times and at the rate of payment equal to that required by any other Employer who is party to the Trust Fund for the same benefits; or

(c) All persons employed by Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined, and as to such personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of the Agreement and Declaration of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is party to the Trust Fund for the same benefits.

(d) Effective July 1, 1973, all persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

* * * *

Section 3.02: Covered Employment.

(a) Any employment of an Employee for which contributions to the Pension Fund are made or are required to be made on his behalf shall be considered Covered Employment if such contributions are in accordance with the rules and regulations of this Plan and Trust Agreement.

(b) Service in the Armed Forces of the United States under Selective Service or during a war or international police action (if such service was entered directly from Covered Employment and if the the Employee returned directly from such service to Covered Employment) shall be considered Covered Employment.

(c) Any employment prior to the date an Employee first became a Participant of this Plan shall be considered Covered Employment if such employment meets one of the conditions as follows:

(1) Employment within a classification of work and in an industry which was at the time of such employment normally covered by Teamster Collective Bargaining Agreements in the same local metropolitan area; and/or

(2) Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund, if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund; and/or

(3) Employment requiring the usual teamster skills in the traditional Teamster Industry at the time of such employment; and/or

(4) Employment which was covered by Teamster Collective Bargaining Agreements with his Employer at the time of such employment.

(d) Any employment after the date an Employee first became a Participant in the Plan, which meets the following condition shall be considered Covered Employment:

Continuous past employment with an Employer in a classification of work prior to the date such Employer became a contributing Employer to the Pension Fund, if the Employee was employed by such Employer in the same classification of work on the date such Employer became a contributing Employer to the Pension Fund.

(e) Employment by a Union as provided for in this Plan, shall be considered Covered Employment.

(f) Under no circumstances (other than the calculation of Vesting Service Week (as defined in Section 3.04 (b)(2)) and solely for the purpose of becoming a Vested Participant) shall any employment by a Participant as a supervisor or in any position excluded from a Bargaining Unit which was or later became subject to a Collective Bargaining Agree-

ment be considered Covered Employment or Credited Service for purposes of this Pension Plan.

(g) Any Participant who is a member of a Bargaining Unit (as defined in Section 1.17) which withdraws from the Pension Fund or otherwise ceases participation in Covered Employment shall lose and be denied all right and claim to any benefit other than whatever benefit which he may be entitled to receive as a result of contributions made or required to be made to the Pension Fund on his behalf upon his sustaining a One-Year Break in Service (as defined in Section 3.05(c)) after the date of such withdrawal or the cessation of Covered Employment by his Bargaining Unit.

* * * *

APPENDIX H

HEARINGS ON THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1979

HEARINGS
BEFORE THE
TASK FORCE ON WELFARE AND PENSION PLANS
OF THE
SUBCOMMITTEE ON
LABOR-MANAGEMENT RELATIONS
OF THE
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES
NINETY-SIXTH CONGRESS
FIRST SESSION
ON

H.R. 3904

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, for the purpose of improving retirement income security under private multiemployer pension plans by strengthening the funding requirements for those plans, authorizing plan preservation measures for financially troubled multiemployer pension plans, and revising the manner in which the pension plan termination insurance provisions apply to multiemployer plans

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HEARINGS HELD IN WASHINGTON, D.C.,
ON JUNE 5 AND 7, 1979

Printed for the use of the Committee on
Education and Labor

96TH CONGRESS
1ST SESSION

H.R. 3904

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, for the purpose of impoving retirement income security under private multiemployer pension plans by strengthening the funding requirements for those plans, authorizing plan preservation measures for financially troubled multiemployer pension plans, and revising the manner in which the pension plan termination insurance provisions apply to multiemployer plans.

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1979

Mr. PERKINS (for himself, Mr. ULLMAN, and Mr. GIBBONS) (by request) introduced the following bill; which was referred jointly to the Committees on Education and Labor and Ways and Means

---

A BILL

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, as amended, for the purpose of improving retirement income security under private multiemployer pension plans by strengthening the funding requirements for those plans, authorizing plan preservation measures for financially troubled multiemployer pension plans, and revising the manner in which the pension plan termination insurance provisions apply to multiemployer plans.

* * * *

SEC. 104. WITHDRAWAL LIABILITY; MERGERS AND TRANSFERS OF ASSETS AND LIABILITIES; PLAN REORGANIZATION; FINANCIAL ASSISTANCE; BENEFITS AFTER TERMINATION; ENFORCEMENT.

Title IV is amended by redesignating subtitle E as subtitle F and adding after subtitle D the following new subtitle:

"Subtitle E—Special Provisions for Multiemployer Plans

"PART 1—EMPLOYER WITHDRAWALS

"EMPLOYER WITHDRAWALS

* * * *

"(6) The corporation may prescribe in regulations the circumstances under which an employer has withdrawal liability when there is a substantial reduction in the employer's contributions under the plan. Any regulations of the corporation under this paragraph may prescribe appropriate notice requirements and the way in which liability is determined under subsection (d) for such partial withdrawals.

* * * *

[COMMITTEE PRINT]

JANUARY 29, 1980

[This print sets forth an amendment in the nature of a substitute for the bill H.R. 3904, as reported by the Subcommittee on Labor-Management Relations on December 13, 1979.]

96TH CONGRESS
2D SESSION

H.R. 3904

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, to improve retirement income security under private

multiemployer pension plans by strengthening the funding requirements for those plans, to authorize plan preservation measures for financially troubled multiemployer pension plans, and to revise the manner in which the pension plan termination insurance provisions apply to multiemployer plans.

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 1979

Mr. PERKINS (for himself, Mr. ULLMAN, and Mr. GIBBONS) (by request) introduced the following bill; which was referred jointly to the Committees on Education and Labor and Ways and Means

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1954, to improve retirement income security under private multiemployer pension plans by strengthening the funding requirements for those plans, to authorize plan preservation measures for

* * * *

SEC. 104. WITHDRAWAL LIABILITY; MERGERS AND TRANSFERS OF ASSETS OR LIABILITIES; PLAN REORGANIZATION; FINANCIAL ASSISTANCE; BENEFITS AFTER TERMINATION; ENFORCEMENT.

Title IV is amended by redesignating subtitle E as subtitle F and adding after subtitle D the following new subtitle:

"Subtitle E—Special Provisions for Multiemployer Plans

"PART 1—EMPLOYER WITHDRAWALS

"EMPLOYER WITHDRAWALS

* * * *

"(c)(1) In the case of an employer's partial withdrawal from a plan, the employer is liable to the plan only for the amount determined under paragraph (3).

"(2) An employer's partial withdrawal from a plan occurs on the last day of a plan year in which—

"A" the contributions which the employer is obligated to make under the plan for the plan year, adjusted for changes in the contribution rate, are less than 5 percent of the contributions which the employer was obligated to make under the plan for any one of the preceding 5 plan years; or

"(B) as a result of the cessation of substantially all of the employer's covered operations at a facility or facilities during a 5-year period the contributions which the employer is obligated to make under the plan for the plan year, adjusted for changes in the contribution rate, are less than 75 percent of the contributions which the employer was obligated to make under the plan for any one of the preceding 5 plan years.

A plan shall be amended to define 'facility' for purposes of this subsection.

"(3) The amount of an employer's liability under this subsection is a pro rata portion, determined in accordance with regulations of the corporation, of the amount determined under subsection (e), (f), or (g), whichever is applicable, for which the employer would be liable had the employer withdrawn on the date of the partial withdrawal, payable in accordance with subsections (i) and (j).

"(4) An employer's liability under this subsection is reduced pro rata, in accordance with regulations of the corporation, by any increase for a subsequent plan year in the contributions which the employer is required to make under the plan, adjusted for changes in the contribution rate.

"(5) An employer is not liable for a partial withdrawal to the extent that the plan has been amended to provide for the reduction or elimination of liability under this subsection.

"(6) An employer to which subsection (b)(2)(A) applies is liable for partial withdrawal if, and only if, the employer's obligation to contribute under the plan is continued for no more than a token or insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

* * * *

STATEMENT OF DON SEIFMAN, COUNSEL, RETAIL CLERKS INTERNATIONAL UNION, ACCOMPANIED BY BARRY S. SLEVIN, COUNSEL

* * * *

The second problem with the withdrawal provisions is that an employer can escape liability by retaining a few employees, rather than withdrawing fully. If significant partial withdrawals are not covered, withdrawal liability is going to be meaningless. Also, liability for substantial partial withdrawals is necessary to protect the plans against the evil that withdrawal liability is designed to combat—the diminution in a plan's contribution base.

Although we disagree, PBGC has taken the position that such withdrawals are not covered under the current statute. The bill must clearly provide that significant partial withdrawals are covered.

This is not an academic problem. The PBGC has already been faced with number of cases in which significant partial withdrawals have taken place. In our industry an employer with more than 100 stores in a geographic area shut down approximately 95, leaving the plan with approximately $22 million in liabilities which now must be shared by the remaining employers in that geographic area.

PBGC is now involved in litigation. *Solar* v. *PBGC*, and this is an example of the adverse effect of partial withdrawals. It is a case in which an employer reduced its employees covered under the plan from over 1,000 participants to less than 15. Because the PBGC has taken the position that it has no jurisdiction, the plan is in trouble. The "withdrawing" employer, who has substantial assets, has gotten off scot-free, leaving the plan with over $19 million in liabilities attributable to its former employees. As a result, the plan can no longer meet ERISA's minimum funding standards and has already received one funding waiver.

We understand that contributions by the remaining employers have already been raised approximately 80 percent, and that another 25 percent increase may be necessary.

It is clear that the impact of withdrawals and partial withdrawals cannot be underestimated. Such actions can shake the basis of the multiemployer plan. Because of such withdrawals, the remaining employers who participate in the plan have increased financial burdens unless you provide the necessary protective provisions in the new law.

* * * *

Mr. SEIFMAN. Well, basically the situation described in *Solar* is an egregious one; but when a collective bargaining agreement is being negotiated with an employer, the employees are not anticipating that they are going to

work for only the period of the collective bargaining agreement, 3 years. Our employees anticipate that they are going to spend their working career with an employer, and it is usually a single employer.

The law is such today, and it would be in the future as the bill is now written, that employers would utilize partial withdrawals, significant partial withdrawals, to avoid liability. It is easy to counsel an employer in an industry like our industry where, let us say, an employer has 100 supermarkets, to maintain a "Ma and Pa" shop with five people, and drop 100 supermarkets from the multiemployer plan. The person who is going to pay for the liabilities resulting from this action by the employer is going to be the other employers who have remained loyal to the plan and are not attempting to sabotage the plan, or avoid their rightful liability.

* * * *

National Coordinating Committee for
Multiemployer Plans

Suite 603
815 Sixteenth Street, N.W., Washington, D.C. 20006
(202) 347-1461

TESTIMONY

OF

ROBERT A. GEORGINE

CHAIRMAN

NATIONAL COORDINATING COMMITTEE FOR

MULTIEMPLOYER PLANS

ON

H.R. 3904,

MULTIEMPLOYER PLAN TERMINATION

INSURANCE

BEFORE

THE PENSION TASK FORCE

OF THE

SUBCOMMITTEE ON LABOR-MANAGEMENT

RELATIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

June 5, 1979

* * * *

We note that the bill would authorize PBGC to define withdrawal by regulation. There are several elements to the withdrawal issue which require definition. For example, the question of whether and to what extent a partial "withdrawal" should result in withdrawal liability is significant. We have, in the past, noted several of these questions in our submissions to PBGC (See Exhibit D) and are prepared to explore them further with the Committee during your deliberations on H.R. 3904. If, in the judgment of this Committee, the definition should be left to the regulatory process, we would urge the drafting of legislative history which gives PBGC the necessary guidance.

Two specific situations should be addressed, in that context.

In the context of plans covering steady employment, the regulations need to address the problem of a "partial withdrawal." For example, an employer may contribute for employees at 10 different plan locations or bargaining units. If the employer ceases to contribute for employees at 9 locations (or bargaining units), he should be considered to have withdrawn from the plan despite the fact that he continues to contribute for a few remaining employees.

Similarly, an employer contributing with respect to different bargaining units should be considered to have withdrawn if he ceases to contribute for the bulk of the employees in question, even though he may continue to contribute for a small number of the employees in a small bargaining unit. Although an approach of this type may require analysis of the circumstances surrounding a drop in contributions by an employer, it cannot be allowed to circumvent the law by withdrawing contributions for the great bulk of covered employees while continuing to contribute for a relative handful of employees.

* * * *

National Coordinating Committee for
Multiemployer Plans

Suite 603
815 Sixteenth Street, N.W., Washington, D.C. 20006
(202) 347-1461

COMMENTS
TO THE
PENSION BENEFIT GUARANTY CORPORATION
ON THE APPLICATION OF TERMINATION
INSURANCE TO MULTIEMPLOYER AND
MULTIPLE EMPLOYER PLANS

* * * *

(4) *Virtual Withdrawal by a Substantial Employer*

In the context of plans covering steady employment, the regulations need to address the problem of a "partial withdrawal." For example, an employer who provides 20 percent of annual contributions to a plan may contribute for employees at 10 different plant locations or bargaining units. If the employer ceases to contribute for employees at 9 locations (or bargaining units), he should be considered to have withdrawn from the plan despite the fact that he continues to contribute for a few remaining employees.

Similarly, a substantial employer contributing with respect to different bargaining units should be considered to have withdrawn if he ceases to contribute for the bulk of the employees in question, even though he may continue to contribute for a small number of the employees in a small bargaining unit. Although an approach of this type may require analysis of the circumstances surrounding a drop in contributions by an employer, a substantial employer cannot be allowed to circumvent section 4063 by withdrawing contributions for the great bulk of cov-

ered employees while continuing to contribute for a relative handful of employees.

* * * *

(c) *Virtual Withdrawal of a Substantial Employer*

In order to prevent devices which might undercut the protection provided by section 4063, the term "withdrawal" should be defined in a manner which encompasses any action by an employer or group of employers which has the effect of withdrawing at least 10 percent of the covered employees from the jurisdiction of the plan. This would include a complete cessation of contributions by a participating employer, the failure to renew a collective bargaining agreement covering any bargaining unit, closing a plant or otherwise ceasing to contribute for one or more plant locations despite the continuation of contributions at other plant locations, "bargaining-out" of a substantial portion of the work force to commence participation in another plan, or contraction of employment. The plan should also be able to provide that the failure by an employer to pay contributions for a specified period will be treated as "withdrawal" from the plan.

* * * *

Testimony Of William J. Olwell
Director of Government and
Community Affairs Department
RETAIL CLERKS INTERNATIONAL UNION,
AFL-CIO
On H.R. 3904
Before the House Committee
On Education and Labor

June 5, 1979

Mr. Chairman, members of the Committee:

My name is William Olwell and I'm here today on behalf of the Retail Clerks International Union. With me is Donald H. Seifman, who is counsel to the RCIU. I am here today to discuss a matter of vital importance—the protection of participants in multiemployer plans, who are threatened with the loss of benefits they have earned.

* * * *

The second problem with the withdrawal provisions is that an employer can escape liability by retaining a few employees, rather than withdrawing fully. If significant partial withdrawals are not covered, withdrawal liability will be meaningless, since employers would be able to escape liability so easily. Also, liability for substantial partial withdrawals is necessary to protect plans against the evil that withdrawal liability is designed to combat—the dimunition in a plan's contribution base. Although we disagree, PBGC has taken the position that such withdrawals are not covered under the current statute. The bill must clearly provide that significant partial withdrawals are covered.

This is not an academic problem: the PBGC has already been faced with a number of cases in which significant partial withdrawals took place. In our industry an employer closed an entire division containing over 100 retail stores, while keeping less than 5 open. PBGC is

now involved in litigation in *Solar* v. *PBGC*, 77 Civ. 5689 (MP) (S.D.N.Y.), a case in which an employer reduced its employees covered under the plan from over 1,000 to less than 15. Because the PBGC has taken the position that it has no jurisdiction, the plan is in trouble. The "withdrawing" employer, who has substantial assets, has gotten off scot-free, leaving the plan with over $19 million in liabilities attributable to its former employees. As a result, the plan can no longer meet ERISA's minimum funding standards, and has already received one funding waiver. We understand that contributions by the remaining employees have already been raised approximately 80 percent, and that another 25 percent increase may be necessary. Past service credit for new participants has been reduced, which is a further disincentive to plan participation.

* * * *

Law Offices
GROOM AND NORDBERG
Suite 450
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

(202) 857-0620

Theodore R. Groom
Carl A. Nordberg, Jr.
Robert B. Harding
Lawrence J. Hass
Louis T. Mazawe
Michael F. Kelleher
Sharon Galm
George D. Crowley

November 30, 1979

The Honorable Frank Thompson, Jr.
Chairman
Task Force on Pension and Welfare Plans
Subcommittee on Labor-Management Relations
Committee on Education and Labor
House of Representatives
112 Cannon House Office Building
Washington, D. C. 20515

Re: Supplemental Comments;
Western Conference of Teamsters
Pension Trust Fund; Termination
Insurance for Multiemployer Plans

Dear Mr. Chairman:

* * * *

5. The bill should prescribe rules for partial withdrawal.

Under the PBGC proposals, a withdrawal is deemed to occur only upon the complete cessation of a contrib-

uting employer's obligation to contribute or the cessation of all of an employer's covered operations. The bill also gives PBGC authority to prescribe in regulations the circumstances under which a substantial reduction in contributions by an employer would result in withdrawal liability. The WCT Plan believes that the circumstances under which a partial withdrawal is deemed to have occurred should be specified in the statute.

Specifically, the statute should provide that a partial withdrawal will occur whenever—

> there is a reduction in the number of employees of an employer covered by the plan of—
>
> (i) fifty percent of employees within two years; or
>
> (ii) such lower percentage as a plan may elect.

* * * *

APPENDIX I

STATUTORY PROVISIONS INVOLVED

1. ***Employee Retirement Income Security Act***

29 U.S.C. § 1381 WITHDRAWAL LIABILITY ESTABLISHED

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1382 DETERMINATION AND COLLECTION OF LIABILITY, NOTIFICATION OF EMPLOYER

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1383 COMPLETE WITHDRAWAL

(a) For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1385 PARTIAL WITHDRAWALS

(a) Except as otherwise provided in this section, there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—

(1) there is a 70-percent contribution decline, or

(2) there is a partial cessation of the employer's contribution obligation.

(b) For purposes of subsection (a)—

(1)(A) There is a 70-percent contribution decline for any plan year if during each plan year in the 3-year testing period the employer's contribution base units do not exceed 30 percent of the employer's contribution base units for the high base year.

(B) For purposes of subparagraph (A)—

(i) The term "3-year testing period" means the period consisting of the plan year and the immediately preceding 2 plan years.

(ii) The number of contribution base units for the high base year is the average number of such units for the 2 plan years for which the employer's contribution base units were the highest within the 5 plan years immediately preceding the beginning of the 3-year testing period.

(2)(A) There is a partial cessation of the employer's contribution obligation for the plan year if, during such year—

(i) the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required or transfers such work to another location, or
(ii) an employer permanently ceases to have an obligation to contribute under the plan with respect to work performed at one or more but fewer than all of its facilities, but continues to perform work at the facility of the type for which the obligation to contribute ceased.

29 U.S.C. § 1388 REDUCTION OF PARTIAL WITHDRAWAL LIABILITY

(d)(1) An employer to whom section 1382(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required.

29 U.S.C. § 1461 EFFECTIVE DATES

(e)(1) Except as provided in paragraphs (2), (3), and (4), the amendments to this Act made by the Multiemployer Pension Plan Amendments Act of 1980 shall take effect on the date of the enactment of that Act.

(2)(A) Except as provided in this paragraph, part 1 of subtitle E, relating to withdrawal liability, takes effect on September 26, 1980.

2. ***Deficit Reduction Act of 1984***

SEC. 558. ELIMINATION OF RETROACTIVE APPLICATION OF AMENDMENTS MADE BY MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980.

(a) In General.—

(1) Liability.—Any withdrawal liability incurred by an employer pursuant to part 1 of subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1381 *et seq.*) as a result of the complete or partial withdrawal of such employer from a multiemployer plan before September 26, 1980, shall be void.

* * * *

(d) Special Rule For Certain Binding Agreement.—In the case of an employer who, on September 26, 1980, has a binding agreement to withdraw from a multiemployer plan, subsection (a)(1) shall be applied by substituting "December 31, 1980" for "September 26, 1980."

No. 92-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

CROWN CORK & SEAL COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

STEVEN B. FEIRSON
(Counsel of Record)
NANCY J. BREGSTEIN
THOMAS W. DOLGENOS
ANDREW J. MOTTES
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(215) 994-4000
Counsel for Respondent

May 21, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, an employer (like respondent) that contributed to a multi-employer plan (like petitioner) is relieved of a statutory liability, called "withdrawal liability," if it (1) had a "binding agreement to withdraw" from the plan before September 26, 1980, and (2) effected a "complete withdrawal" from the plan by December 31, 1980. The statute further provides that a "complete withdrawal" takes place when the employer either "(1) permanently ceases to have an obligation to contribute under the plan, *or* (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (emphasis added).

The questions presented are:

(1) Whether, as both courts below and all but one other federal court have held, there is a "complete withdrawal" within the meaning of 29 U.S.C. § 1383(a)(2) when an employer ceases its normal business operations as part of a total shutdown, regardless of whether the test for a complete withdrawal under subsection (a)(1) is satisfied.

(2) Whether, as both courts below held on the specific facts of this case, respondent had a "binding agreement to withdraw" before September 26, 1980.

STATEMENT PURSUANT TO RULE 29.1

The following information is provided pursuant to this Court's Rule 29.1: Respondent Crown Cork & Seal Company, Inc. has eleven non-wholly-owned subsidiaries: Aluplata S.A.; Canmakers (Nigeria) Limited; Continental Can Hong Kong; Crown Cork Company (Belgium) N.V.; Crown Cork Company (Pvt) Limited; Crown Cork Company (Zambia) Limited; Crown Cork del Peru, S.A.; Crown Cork & Seal (Thailand) Co., Ltd.; Emirates Can Company, Ltd. (Dubai, UAE); The Crown Cork Company (East Africa) Ltd.; and The Crown Cork & Seal Company (Nigeria) Ltd.

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The full facts and procedural history of this case, as well as the statutory scheme governing this case, are accurately stated in the opinion of the Third Circuit. Pet. App. 3a-9a. What follows is a summary of those matters.

1. *Facts.* In July of 1980, Harold Abrams, Director of Industrial Relations for respondent Crown Cork & Seal Company ("Crown"), sent a letter to each of the four unions that represented Crown's employees at its St. Louis plant to inform them that the company had made a final decision to close the plant. Meetings were held on several

subsequent occasions to negotiate the effects of the plant closing, but the company's decision was not challenged. Pet. App. 3a-4a.

Massive reductions in the work force at the St. Louis plant followed. As a result of layoffs, terminations, and transfers, "only 9 of Crown Cork's 29 management employees remained at the St. Louis Plant after September 26th; 44 of the 148 production and maintenance workers remained; of 12 clerical workers, only 4 remained." Pet. App. 4a.

In addition, plant managers were notified by mailgram on September 16, 1980, that the St. Louis plant would close at the end of business on September 26, and that all orders placed at the St. Louis plant should be switched to another point of manufacturing before then. Pet. App. 4a. "Finish-up" work, consisting of assembling remaining materials into cans, was performed up until October 10, 1980, and amounted to only 265 production line-hours, or only 5% of the line-hours worked in April 1980.

Even this finish-up production work ceased completely by October 10. Thereafter, "the only work performed at the St. Louis plant consisted of tasks incidental to the final closing of the plant; dismantling, maintenance, clean-up and disposal of equipment and property." *Id.* By December 31, 1980, "only three members of Local 688's production and maintenance unit and only one member of Local 688's clerical unit were still employed at the St. Louis Plant, performing shut down work." Pet. App. 5a.[1] The last of these employees was laid off on November 6, 1981. *Id.*

On September 23, 1980, Crown entered into a listing agreement with a real estate broker to sell the plant. Pet.

[1] The parties had "stipulated that the sole activities after October 10, 1980 were tasks performed by just four employees incidental to plant closing." Pet. App. 17a n.10.

App. 4a. The plant ultimately was sold on June 3, 1982. *Id.*

2. *The statutory scheme.* Multiemployer pension plans like petitioner are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. On September 26, 1980, Congress enacted the Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. §§ 1381-1453). Under MPPAA, an employer that withdraws from a multiemployer fund becomes obligated to pay a share of the plan's unfunded vested benefits. This obligation is called "withdrawal liability."

As originally enacted, MPPAA had retroactive effect. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 723 (1984). Although this Court held in the *Gray* case that MPPAA's retroactivity was constitutional, Congress nevertheless changed its mind on that point and subsequently amended MPPAA's effective date as part of the Deficit Reduction Act of 1984 ("DEFRA"), Pub. L. No. 98-369, 98 Stat. 494.[2]

Section 558 of DEFRA provides, *inter alia*, that an employer that had a "binding agreement to withdraw" from a plan before September 26, 1980 would be exempt from withdrawal liability, as long as a "complete withdrawal" from the plan took place before December 31, 1980. MPPAA defines a "complete withdrawal" from a multiemployer plan as occurring *either* when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all

[2] As explained by the court below, "[t]he Senate Finance Committee found that the retroactive application of MPPAA had an unduly burdensome effect on employers that withdrew between April and September, 1980 and was unnecessary to preserve the financial integrity of multiemployer plans." Pet. App. 9a (citing *Long Island Oil Prods. Co.* v. *Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir. 1985)).

covered operations under the plan." 29 U.S.C. § 1383(a).[3] Because DEFRA's special, one-time-only exemption from withdrawal liability was granted only to employers who withdrew before December 31, 1980, it has no current vitality, and it is doubtful that there are any more cases pending under § 558.

3. *Opinions below.* Both courts below held that Crown is not responsible for any withdrawal liability based on its closing of the St. Louis plant. They held, on the specific facts of this case, that Crown had a binding agreement to withdraw from the plan on September 26, 1980; and that a complete withdrawal from the plan had occurred before December 31, 1980. The rationale for the latter part of the courts' holdings was that no "operations" took place at the St. Louis plant after October 10, 1980, when all production ceased. See Pet. App. 15a-18a. Although some employees performed clean-up and dismantling work after December 31, 1980, for which Crown continued to make contributions to the pension plan, that work was merely incidental to the shutdown, and did not constitute the normal operational or business activity of the facility. Therefore, the Court of Appeals held that this work did not constitute "operations" as that term is used in the statute, and that a "complete withdrawal" occurred before December 31, 1980, because Crown had "cease[d] its normal business operations in preparation for a shutdown." Pet. App. 3a.

SUMMARY OF ARGUMENT

1. Petitioner claims that there is a conflict between the holding of the Third Circuit in this case and that of the Seventh Circuit in *Trustees of Iron Workers Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989). The hold-

[3] Similarly, the date of a "complete withdrawal" is defined as "the date of the cessation of the obligation to contribute *or* the cessation of covered operations." 29 U.S.C. § 1383(e) (emphasis added).

ings of the two cases, however, on their very different facts, are not in conflict.

In this case, all production work had ceased prior to the date of the claimed withdrawal. The Third Circuit therefore focused on the correct definition of the term "operations" in § 1383(a)(2), which says that a complete withdrawal occurs when an employer "permanently ceases all covered operations." The Third Circuit ultimately held that when Crown's production, which constituted its normal business activity, ended, its "operations" ceased, and a complete withdrawal existed under the statute.

In *Allied Products*, on the other hand, actual production work continued beyond the date of the claimed complete withdrawal. Therefore, the definition of "operations" was irrelevant to that decision since no matter what "operations" might mean, it clearly included production work. As a result, the parties and court focused on the meaning of the word "all" in the phrase "permanently ceases all covered operations," rather than on the word "operations." The Seventh Circuit rejected the pension fund's argument and the holding of the district court, that "all" could be read as "virtually all." Hence, even though the amount of work was *de minimis*, the Seventh Circuit held that the statute's requirement of a cessation of "all" covered operations had to be read literally, and accordingly no withdrawal had occurred.

This Court reviews only direct, intolerable conflicts in the holdings of the courts of appeals. There is no such conflict here.

2. Even if the approaches of the Third and Seventh Circuits diverge, the practical consequences of this difference in opinion are likely to be insignificant at best. First of all, it takes a very special confluence of several factors to result in this type of dispute over withdrawal liability. The infrequency of that confluence is reflected in the fact that in the thirteen years since MPPAA was

passed, there have been only two federal appellate court cases (*Allied Products* and the instant case) and six district court cases dealing with the questions presented here. In fact, in view of the improbability that any more cases will be brought under § 558 of DEFRA, there will almost certainly be even fewer cases in the future. The infrequency with which these issues have been litigated belies petitioner's dire predictions of great confusion if this Court does not address these issues. Petitioner has advanced no reason why this Court must address these questions at this juncture, when there is no square conflict, rather than after their fuller consideration by other courts of appeals if these questions ever should arise again.

3. Although framed by petitioner as an issue about the Court of Appeals' approach to statutory construction, at bottom petitioner merely disagrees with the Third Circuit's conclusion as to the meaning of § 1383(a)(2). In fact, the decision of the Court of Appeals is supported by all the other federal court decisions on the question except for *Allied Products*, and was reached using settled principles of statutory construction. The Third Circuit's consideration of legislative history was routine and completely appropriate. The meaning of the statutory term "operations" is by no means self-evident; and the fact that all the other courts that have considered the question (except for the Seventh Circuit) have adopted the same interpretation of the term as the Third Circuit's substantially undermines petitioner's argument that the term unambiguously has a different meaning. Nor was there anything exceptional about the Third Circuit's failure to address the views expressed by the Pension Benefit Guaranty Corporation ("PBGC") in an *amicus* brief filed three years earlier in a different appeal, where the PBGC neither filed an *amicus* brief in this appeal nor even informed the Court of Appeals that it still adhered to its previously expressed views; where the PBGC had no rules or regulations on the subject; and where the PBGC has a history of taking inconsistent positions on this very issue.

4. Both the District Court and the Court of Appeals carefully considered the facts of this case and arrived at the same conclusion: that respondent had a "binding agreement to withdraw" from the plan before September 26, 1980. Petitioner has advanced no persuasive reason why this Court should review these facts and the conclusion reached, as to which the two lower courts were in agreement. Moreover, this issue under § 558 of DEFRA is unlikely to arise ever again, since that statute applied by its terms only to employer withdrawals that took place almost thirteen years ago.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN DECISIONS REQUIRING RESOLUTION BY THIS COURT.

The petition is based primarily on a supposed conflict between the decision of the Third Circuit in this case and that of the Seventh Circuit in *Trustees of Iron Workers Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989). An examination of the facts and holdings in the two cases, however, reveals that the Third Circuit has not "rendered a *decision* in conflict with the *decision* of another United States court of appeals on the same matter." Sup. Ct. R. 10.1(a) (emphasis added). Indeed, the Third Circuit itself distinguished *Allied Products* on its facts. See Pet. App. 17a n.10.

Under § 1383(a)(2), a complete withdrawal occurs when an employer ceases "all covered operations."[4] Because the appellate courts in *Allied Products* and this case were presented with different facts and different arguments concerning this provision, each court focused on a different aspect of this statutory test in its holding.

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[4] The statute provides two alternative tests for effecting a "complete withdrawal." The first, in § 1383(a)(1), depends on a cessation of the employer's obligation to contribute to the plan. Since contributions continued beyond the claimed withdrawal date in both this case and *Allied Products*, no argument was made in either case of a complete withdrawal under subsection (a)(1).

In *Allied Products*, the pension plan claimed that there had been a "complete withdrawal" under § 1383(a)(2) during the plan year ending June 30, 1983. Allied, the employer, claimed that its "complete withdrawal" from the plan did not occur until the next year, the plan year ending June 30, 1984. The critical fact in *Allied Products* was that regular production work, including manufacturing and the processing of purchase orders, was performed after the withdrawal date urged by the plan. As the Seventh Circuit noted, "Allied still received, processed and filled seven purchase orders during 1983." 872 F.2d at 209. The pension fund nevertheless argued that a complete withdrawal had taken place on the ground that the amount of work performed after its claimed withdrawal date was *de minimis*. The district court had accepted this argument and ruled that "it was sufficient if 'virtually all' (as opposed to 'all') covered operations came to a halt in order to trigger withdrawal liability." 872 F.2d at 212.

The Seventh Circuit disagreed, reasoning that "Congress meant 100 percent when it said 'all' " and therefore that "there simply is no other way to remain faithful to Congress' intent, as expressed by the statute's clear and unambiguous language, other than to hold that all (100 percent) of the covered operations must permanently cease before finding an employer has completely withdrawn from a multiemployer plan." *Id.* at 213. The Seventh Circuit held that a finding of a complete withdrawal during the plan year ending June 30, 1983, was precluded by the facts, among others, that "Allied's employees produced and shipped products to some of its primary customers even after [that date]" and "Allied also received several purchase orders after [that date]." *Id.* at 214.

In the instant case, by contrast, no production work at all was performed at the St. Louis plant beyond December 31, 1980, the date of the complete withdrawal claimed by Crown. The Third Circuit explicitly pointed

out this critical factual distinction (see Pet. App. 17a n.10) and, consistent with every other federal court decision on the question, held that under § 1383(a)(2) "an employer has completely withdrawn when it ceases its normal business operations in preparation for a shutdown." Pet. App. 3a.[5]

Thus, the Third Circuit in this case focused on the type of work that would constitute "operations"; held that such operations were the employer's normal business operations; and therefore did not have to consider a *de minimis* argument since no such operations took place after Crown's claimed withdrawal date. The Seventh Circuit in *Allied Products*, on the other hand, was presented with and rejected a *de minimis* argument, and did not have to define the scope of the term "operations," since it was clear that whatever "operations" might be, they certainly existed beyond the claimed withdrawal date in that case, albeit at reduced levels.

To be sure, the Seventh Circuit went beyond what was necessary to its holding and mused in a brief, conclusory footnote about the correct definition of "covered operations" within the meaning of § 1383(a)(2). In that dictum, it said that " 'covered operations' refers to those

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[5] Petitioner ignores this *holding* and instead attempts to focus attention on other language in the Third Circuit's opinion in order to persuade this Court that there is a conflict in decisions. The Third Circuit's reference, however, to the occurrence of a withdrawal upon a "substantial cessation of normal business operations" (quoted in Pet. at 10), came in the context of the court's description of the statute's legislative history. See Pet. App. 18a. It was not the court's holding. Indeed, only a few lines after the Third Circuit's description of the legislative history in the statement emphasized by petitioner, the Third Circuit reiterated its agreement with the holdings of other federal courts consistent with its holding (as stated at Pet. App. 3a), that "the performance of non-operational tasks incidental to a total closing of the facility does not prevent the court's finding that a complete withdrawal has occurred." Pet. App. 18a (emphasis added).

operations which are covered by the collective bargaining agreement . . . for which the employer must contribute to the pension plan." 872 F.2d at 214 n.10. Therefore, according to the Seventh Circuit, "the issue is whether bargaining unit work is being performed for which contributions are being made, not simply whether production work is being performed." *Id.*

This statement by the Seventh Circuit is at variance with the understanding of "operations" adopted by the Third Circuit in this case, as well as every other federal court that has interpreted the term. The Seventh Circuit's statement is dictum, however, since it was completely unnecessary to the decision in that case.[6]

This Court does not issue writs of certiorari to review differences in the opinions of courts of appeals, where those differences do not amount to square conflicts in the lower courts' decisions. See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196-97 (6th ed. 1986). "[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." *Id.* at 196 & n.22 (quoting Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 617 (1984)). Because of the factual differences between the Third and Seventh Circuit cases, the differing focuses of their opinions, and the fact that the Seventh Circuit's interpretation of the phrase "covered operations" is dictum, there is no such "intolerable" conflict here that would call for review by this Court.

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[6] It also was a completely non-analytical statement. It was not based on arguments of the parties, a consideration of legislative history, or the obvious problem that the definition it proposes makes the test for withdrawal set forth in § 1383(a)(2) redundant with the test in § 1383(a)(1). See p. 19, *infra*.

II. THIS ISSUE IS UNLIKELY TO ARISE FREQUENTLY, AND SO THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR THIS COURT TO RESOLVE.

Even if there were a sufficiently direct conflict to warrant this Court's attention, there are practical reasons for not granting the writ of certiorari. Petitioner claims that "[t]he problem created by this split is significant" (Pet. at 10); that "[t]he circumstances leading to this problem . . . are not rare" (Pet. at 11); and that "[t]his Court's guidance is urgently needed now." Pet. at 30. These statements are dramatic, but unfounded. In the nearly thirteen years since MPPAA was passed, the question of the meaning of the phrase "complete withdrawal" under § 1383(a) apparently has arisen in only two appellate cases (this one and *Allied Products*), and six district court cases.[7] One appellate court case every six or so years hardly presents the type of burning issue for federal courts, employers, or pension plans, that petitioner claims. And petitioner's claims of importance and urgency are further belied by the apparent absence of any new lawsuits concerning this provision in the last eight years.[8]

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[7] See *Speckman* v. *Barford Chevrolet Co.*, 535 F. Supp. 488 (E.D. Mo. 1982); *F.H. Cobb Co.* v. *New York State Teamsters Conf. Pension and Retirement Fund*, 584 F. Supp. 1181 (N.D.N.Y. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 607 F. Supp. 570 (S.D.N.Y. 1985); *ILGWU Nat'l Retirement Fund* v. *Weatherall Fashions, Inc.*, No. 84-0772, 1986 WL 2757 (S.D. N.Y.); *Connors* v. *Economy Bldg. Systems, Inc.*, 651 F. Supp. 849 (D.D.C. 1986); *Combs* v. *Leishman*, 691 F. Supp. 424 (D.D.C. 1988).

[8] *Connors* v. *Economy Bldg. Systems, Inc.*, *supra*, apparently the most recently-filed lawsuit, was filed in 1985.

Moreover, of the eight cases that have dealt with the "complete withdrawal" issue, four involved disputes over the date of a complete withdrawal for purposes of claiming the total exemption from liability granted by DEFRA in limited circumstances. In that situation, employers had far more at stake and hence were more likely to litigate than in ordinary withdrawal liability disputes, which might or might not have involved differing amounts of with-

This Court generally does not grant certiorari when the issue, even if important and the subject of a true conflict of lower court decisions, is no longer a live one. See *Supreme Court Practice* § 4.4, at 200.

It is not surprising that there have been so few cases like this one. In order to have this particular dispute over the meaning of "complete withdrawal" come to the courts, a unique confluence of factors must be present. First, the employer must cease its normal operations but keep on some workers to perform tasks incidental to shutdown, like clean-up and maintenance. Second, the employer must use employees covered by the collective bargaining agreement, for whom contributions must be made, to perform those tasks, rather than hiring an outside cleaning or security service to perform them.[9] Third, the union employees who remain on the payroll must do so past the end of a plan year. Fourth, there must be a significant difference in the amount of withdrawal liability from one plan year to the next to trigger any real dispute.

Unless all of these factors are present, the issue of the correct date of a complete withdrawal will not be litigated. Thus, for the same reasons that the issue has come up

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drawal liability from one plan year to another, but did not involve total exemption from liability.

Since DEFRA cases thus were different from other withdrawal cases and can no longer be brought, those cases should not even be considered in assessing how frequently ordinary withdrawal liability cases have been brought and are likely to be brought in the future. Excluding the DEFRA cases, only one appellate case, *Allied Products*, and three district court cases have been brought in the last thirteen years.

[9] Indeed, in light of the Seventh Circuit's decision in *Allied Products*, it is unlikely that there will be occasions in the future in which this issue will come up, since employers who can benefit financially from an earlier withdrawal date can simply use outside workers rather than union employees for tasks incidental to shutdown.

infrequently in the past, it is unlikely to arise with any frequency in the future. In short, the issue is basically academic and does not call for this Court's review.

In any event, even if this issue were to arise again in the future, it would be beneficial to this Court to have the views of additional courts of appeals, both on the subject of whether a *de minimis* rule is appropriate and on the subject of the proper definition of "operations." This is especially true in view of the Seventh Circuit's cursory treatment of the "operations" issue and the fact that the Third Circuit did not focus on the *de minimis* question.[10]

If these are the critical, recurring issues that petitioner claims they are, this Court will have ample opportunity, on a fuller and more developed body of precedent, to address them. On the other hand, if, as history suggests, such problems are unusual and isolated, they simply are not worthy of review by this Court.[11]

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[10] Moreover, this would be an inappropriate case in which to consider the "complete withdrawal" issue in view of the facts that the Third Circuit's decision is in line with all the other federal court decisions, whereas *Allied Products* is the aberrant decision, and certiorari was denied in *Allied Products*.

[11] In *PBGC* v. *Gray*, *supra*, by contrast, the question of the constitutionality of the retroactive application of MPPAA's withdrawal liability provisions was "the subject of extensive nationwide litigation." *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502, 1504 & n.2 (9th Cir. 1983) (partially listing cases). See also 467 U.S. at 728 n.7.

III. THE COURT OF APPEALS ADHERED TO THIS COURT'S SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION IN INTERPRETING SECTION 1383(a).

A. The Court of Appeals' Use of Legislative History Was Routine and Appropriate.

In its opinion below, the Court of Appeals announced no new principles of statutory construction. Instead, it engaged in a routine application of settled interpretive rules. While petitioner attempts to generate controversy over the application of the "plain meaning" rule, the Court of Appeals' use of legislative history was standard and entirely appropriate.[12] In any event, there is no issue here of sufficient importance to warrant review.

The Court of Appeals acted properly by examining the legislative history in the face of ambiguous statutory language. The term "covered operations" in § 1383(a)(2) is nowhere defined in ERISA. Nor is its meaning immediately clear on its face. The Court of Appeals accordingly held that the phrase is ambiguous. Pet. App. 18a.[13] It is, of course, one of the fundamental principles of statutory interpretation that "[w]here . . . a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language *and then to the legislative history* if the statutory language is unclear." *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984)

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[12] Recent decisions by this Court have reinforced the long-settled principle that examination of legislative history is an important interpretive tool. See, e.g., *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1170-72 (1993) (Court looks to legislative history when interpreting RICO provision); *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647-50 (1990) (Court examines ERISA legislative history in order to ascertain congressional intent).

[13] Since every court that has addressed the meaning of "covered operations" (except the Seventh Circuit) has agreed with the Third Circuit's construction, petitioner's suggestion that the statute unambiguously means something else is difficult to fathom.

(emphasis added); see also *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 (1992) (endorsing resort to legislative history to resolve statutory ambiguity).[14]

In addition to its finding of ambiguity, the court below noted that petitioner's interpretation of § 1383(a)(2) would lead to a statutory redundancy. See Pet. App. 16a n.9.[15] It follows that the court below had a duty to examine closely the intent of Congress so as to avoid the redundancy, or at least to justify it. As this Court has long recognized, a court engaged in statutory interpretation must give effect, if possible, to every word or clause. *Montclair* v. *Ramsdell*, 107 U.S. (17 Otto) 147, 152 (1883). Where the statute's terms appear to conflict or overlap, the court should explore the legislative history to ensure that the will of Congress is carried out. See *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981).

Petitioner's further argument that the kind of legislative history relied upon by the Third Circuit was inherently unreliable, Pet. at 22-24, is completely baseless. The court below relied principally on the reports of two congressional commitees, the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources. See Pet. App. 17a-18a. Contrary to petitioner's assertions, committee reports are the "most persuasive indicia of congressional intent in enacting a statute." 2A Singer, *Sutherland Statutory Construction* § 48.06, at 332 (5th ed. 1992). This Court has itself recognized the reliability of committee reports, "which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying

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[14] This Court has noted that it is particularly important to consider legislative history when interpreting labor statutes and similar statutes that represent a careful balancing of powerful competing interests and important national policies. *National Woodwork Mfrs. Assoc.* v. *NLRB*, 386 U.S. 612, 619 (1967).

[15] Indeed, petitioner concedes that its reading of § 1383(a)(2) may be redundant in light of § 1383(a)(1). Pet. at 20 n.16.

proposed legislation.' " *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (citations omitted). Far from committing error, the Court of Appeals was completely justified in examining these reports as part of its systematic inquiry into the intent of Congress.[16]

B. The Court of Appeals Was Not Obligated to Defer to an *Amicus* Brief Filed by the PBGC in a Different Appeal Years Earlier.

Petitioner argues that this Court should review the Court of Appeals' departure from the views expressed in an *amicus* brief filed by the PBGC three years ago, when this case was before the Court of Appeals on a different appeal. The Court of Appeals, however, broke no new ground in not deferring to this brief.

First, the PBGC brief so heavily relied upon by petitioner is not an agency rule or regulation, and does not merit the deference due those formally approved statements of position. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988) (refusing to apply principle of deference to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice").

Second, the PBGC did not file the brief in connection with this appeal. The brief was filed in 1989, and, as petitioner concedes, was only "provided the panel in this appeal through the joint appendix." Pet. at 21 n.17. The agency chose, for whatever reason, not to file a new brief when this case again reached the Court of Appeals in 1992.[17] Nor did the PBGC even reaffirm its old brief

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[16] Petitioner presents no evidence that any other congressional committee had a different understanding of what constitutes a cessation of operations.

[17] The Federal Rules of Appellate Procedure set out specific requirements for filing *amicus* briefs. See Fed. R. App. P. 29. Therefore, prospective *amici* certainly do not file a brief in one case and expect to receive consideration, let alone deference, from all courts hearing similar issues in the future.

through, for example, a letter to the court. Considering that no *amicus* brief was actually filed here, and considering the very real possibility that the views expressed in the earlier brief had grown stale, it is no wonder that the Court of Appeals chose not to defer to them. *Cf. Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U.S. 232, 259 (1976) (refusing to defer to SEC *amicus* brief and noting that brief was actually filed in different case).

Third, the position taken in the PBGC's brief is inconsistent with a prior position taken by the agency. As petitioner concedes, the PBGC once argued to another court that under ERISA, an employer who has reduced its participation in a fund to minimal levels may be found to have withdrawn from the plan. Pet. at 24-25; see *Solar* v. *PBGC*, 504 F. Supp. 1116, 1122-24 (S.D.N.Y.), *aff'd*, 666 F.2d 28 (2d Cir. 1981).[18] This Court has recognized that an inconsistent agency opinion "is entitled to considerably less deference than a consistently held agency view." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted).

Finally, deference to even an established agency position is appropriate only where the court, "employing traditional tools of statutory construction," finds that Congress did not speak to the disputed issue. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Since the Court of Appeals found that Congress intended the term "covered operations" to refer to normal business activity, the court cor-

[18] *Solar* appears to have been the only case before the passage of MPPAA that concerned withdrawal liability. Even though the issue faced by the court and addressed by the PBGC in that case concerned pre-MPPAA withdrawal liability, the nature of the basic dispute was similar: the point at which an employer is deemed to have withdrawn from a multiemployer fund. The district court in *Solar* expressed concern that the PBGC's abrupt turnaround was a product of "new personnel" rather than considered statutory interpretation. 504 F. Supp. at 1123.

rectly chose not to consider the agency's old, contrary position.

C. The Court of Appeals Correctly Interpreted "Covered Operations" to Mean "Normal Business Activity."

Although framed as an argument over methods of statutory construction, at bottom petitioner merely disagrees with the Court of Appeals' conclusion as to the meaning of § 1383(a)(2). The Court of Appeals held that the term "covered operations" refers to the employer's "normal business operations." Pet. App. 3a. Thus, where an employer has ceased normal business activities but retains a handful of employees for clean-up, maintenance, security, or the like, the employer has "completely withdrawn" from the plan for purposes of § 1383(a)(2). This interpretation is the only construction that makes sense, effectuates the intent of Congress, and renders no statutory language superfluous.[19]

Petitioner argues, however, that "covered operations" means "operations that give rise to the obligation to con-

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[19] Indeed, the phrase "covered operations" is used elsewhere in ERISA, always to describe actual business activity. The phrase is found, for example, in 29 U.S.C. § 1461(h)(2), which voids withdrawal liability for any grocery wholesaler who "ceased all covered operations" and "relocated its operations to a new facility" and obtained all necessary permits with respect to "construction of and commencement of operations at the new facility" before September 26, 1980. In this provision, the term clearly refers to normal business activities, moved from one location to another.

The phrase is also used in 29 U.S.C. § 1397, which excuses employers who withdraw from multiemployer plans after the enactment of MPPAA from withdrawal liability allocable to work performed at facilities prior to September 26, 1980. At least one court of appeals has noted that, under § 1397, an employer might be exempt from withdrawal liability for a facility shut down prior to the enactment of MPPAA even if a few employees are retained there to wind down the operation. *Barbizon Corp.* v. *ILGWU National Retirement Fund*, 842 F.2d 627, 632 (2d Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).

tribute to the plan." Pet. at 17. This interpretation, however, creates a redundancy, by obliterating the distinction between subsections 1383(a)(1) and (a)(2). "Complete withdrawal" would be defined only by the cessation of an obligation to contribute, and the "covered operations" language would effectively be read out of the statute.[20]

Petitioner's strained reading of § 1383(a) is at odds with the unmistakable intent of Congress. Sections 1383(a)(1) and (a)(2) are obviously not the same—they were written as separate provisions so as to encompass different factual circumstances. See *Garcia* v. *United States*, 469 U.S. 70, 73 (1984) (where clauses of statute are separated by conjunction "or," these terms are to be given "separate meanings"). An employer has withdrawn from a plan under MPPAA where it has *either* ceased to make contributions (for example, after the expiration of a collective bargaining agreement), *or* where it has ceased its normal business activity.[21]

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[20] Petitioner suggests (at 20 n.16) that § 1383(a)(2) is a "clarifying redundancy." Courts are obligated, however, to avoid redundancies where alternative, sensible interpretations exist. Petitioner also suggests that § 1383(a)(2) might cover a situation where an employer "may" be under an "obligation . . . to contribute should work ever resume at the facility . . . ." *Id.* It is hard to imagine the tortured scenario that petitioner has in mind, and it is virtually certain that Congress had no such scenario in mind when it enacted § 1383 with its two separate subsections.

[21] Petitioner points out that the term "covered work" is a term of art in labor caselaw which describes work performed under a collective bargaining agreement. Pet. at 19. But Congress did not use the term "covered work" in § 1383(a)(2); it used "covered operations." Presumably, the drafters of MPPAA could have used the term of art noted by petitioner had they chosen to do so. The Court of Appeals correctly interpreted the phrase that actually appears in the statute.

IV. THE COURT OF APPEALS CORRECTLY APPLIED SECTION 558 OF DEFRA TO THE SPECIFIC FACTS OF THIS CASE.

Petitioner briefly argues that the Court of Appeals incorrectly applied the part of § 558 of DEFRA that requires an employer to have had a "binding agreement to withdraw" before September 26, 1980, in order to be exempt from withdrawal liability.

The Court of Appeals' conclusion that § 558 was satisfied in this case was the result of a fact-specific inquiry which does not warrant further review. The opinion below adequately supported the conclusion of both courts below that Crown had a "binding agreement to withdraw" by the critical date. After finding the operative phrase ambiguous, Pet. App. 12a, the Court of Appeals examined expressions of congressional intent and concluded that the phrase refers to employers who have "effectively and irrevocably committed" to withdraw from a multiemployer plan. Pet. App. 13a-14a. The opinion goes on to describe carefully the various irrevocable commitments made by Crown before September 26, 1980, toward closure of its St. Louis plant, and agreed with the District Court that these actions "bound" Crown to withdraw as effectively as any contractual agreement. Pet. App. 14a. There is nothing remarkable about the application of the statute to the facts of this case by the courts below, and certainly nothing that warrants review by this Court.

Moreover, the meaning of the operative language of § 558 of DEFRA almost certainly will not recur in any cases in the future. That provision relieved employers of withdrawal liability only if they took the specified actions by the statutory deadlines in 1980. Any disputes over what took place nearly 13 years ago would have to have been litigated already, and will not recur. Thus, the issue is not a live one and need not take up this Court's time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN B. FEIRSON
(Counsel of Record)
NANCY J. BREGSTEIN
THOMAS W. DOLGENOS
ANDREW J. MOTTES
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(215) 994-4000
Counsel for Respondent

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